In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 5[illegible]

JOHN J. ROGERS, et al.,

Petitioners,

vs.

ALASKA STEAMSHIP COMPANY, et al.,

Respondents.

JOHN J. ROGERS,

Petitioner,

vs.

AMERICAN PRESIDENT LINES,

Respondent.

CONSOLIDATED PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in *Rogers v.*

Alaska Steamship Company (docketed below as No. 16,862) on January 27, 1961, and the judgment of the said Court in *Rogers v. American President Lines* (docketed below as No. 17,110) dated June 5, 1961. On June 20, 1961, Associate Justice Douglas signed an order extending time to file petition for writ of certiorari to September 1, 1961, to allow consolidated petitions.

CITATIONS TO OPINIONS BELOW

The order of the District Court immediately involved in No. 16,862 is printed in Appendix B at pp. 32-35. The order of the District Court involved in No. 17,110 is printed in Appendix B at pp. 35a-35c.

The opinion of the Court of Appeals in No. 16,862 is reported at 290 F.2d 116; rehearing denied, 290 F.2d 124. It is printed in Appendix B at pp. 4-24.

The opinion of the Court of Appeals in No. 17,110 is not yet reported; it is printed in Appendix B at pp. 25-31.

The original order of the District Court (R. 76-78), which is ultimately involved, is printed in Appendix C at pp. 65-67; the opinion of the Court of Appeals in the appeal from that order is reported at 249 F.2d 646, and is printed in Appendix C at pp. 68-78.

The Consent Decree of the Court of Appeals for the Ninth Circuit in *NLRB v. Pacific American Shipowners Association, et al.,* No. 13,386, entered on June 19, 1952, and which has a fundamental relationship

to the underlying controversy, is unreported; it is printed in Appendix C at pp. 36-64.

JURISDICTION

The judgment of the Court of Appeals in case docketed No. 16,862 was entered on January 27, 1961. (App. B, pp. 4-21.) Rehearing was denied on April 4, 1961. (App. B, pp. 22-24.) The judgment of the Court of Appeals in case docketed No. 17,110 was entered on June 5, 1961. (R. III, p. 55.)* (App. B, pp. 25-31.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether class actions lie in admiralty.

2. Whether representative suits for seamen's wages may be joined, when predicated on the same questions of fact and law, though involving different voyages.

3. Whether a libel for wages in admiralty may be dismissed with prejudice for mere misconstruction of an ambiguous order to replead without violating due process of law.

4. Whether wage claims by seamen can be stated in the form of the common counts, in the presence of statutory shipping articles and releases.

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*References to transcript of record in the appeal in case docket No. 17,110 are hereinafter preceded by "R. III".

RULES AND CONSTITUTIONAL PROVISION INVOLVED

The rules involved are Admiralty Rules 22 and 44 of this Court, Rule 23(a) of the Federal Rules of Civil Procedure, and Local Admiralty Rule 7 of the United States District Court for the Northern District of California. The Constitutional provision involved is the Fifth Amendment to the United States Constitution. They are printed in the order mentioned in Appendix A at pp. 1-3.

STATEMENT

> ". . . [Y]ou will be inclined to think that the client's rights are made to depend too much on mere questions of procedure, . . . and I regret to say that there have been few periods . . . when there was not much justification for the criticism. . . ."
>
> Harlan F. Stone, Law and Its Administration 108 (1924).

INTRODUCTION

None of the rulings involved here go to the merits of the controversy. Yet, their practical effect will be to deprive some 650 seamen of a hearing of their claims for back wages. The District Court ruled as it did on the ground that it lacked power to adopt the procedural solutions suggested by petitioners. Thus, what is presented are refusals to exercise discretion rather than abuses of discretion. In the opinion of

petitioners, this case at best is an extreme example of procedural conservatism in the face of novel circumstances; at worst it could be characterized as a demonstration of an unsympathetic, if not hostile, judicial attitude towards what may have been conceived to be unreasonable demands by seamen for back wages which could well involve aggregate amounts running into seven figures. In any event, the wage claims of all but one petitioner were, ultimately, dismissed by District Court Judge Goodman for misconstruing an ambiguous order of then District Court Judge Hamlin in regard to joinder of parties and claims, but in a manner which, in the interim, District Court Judge Harris had indicated to be satisfactory.[1] The remaining petitioner's claims were subsequently dismissed by District Court Judge Weilenberg on the ground that Admiralty Rule 22 of this Court precludes the use of the common counts in admiralty when shipping articles and releases are executed. An appeal from that order has resulted in a recent (June 5, 1961) affirmance by the Court below, in docket No. 17,110 of that Court.

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[1]The District Court below uses the master calendar system, which can, as in this case, cause problems. Petitioners sought to have the case assigned to a single judge as recommended in the *Handbook of Recommended Procedure for the Trial of Protracted Cases*, 25 F.R.D. 351, 377 (the general practice of the District Court below is noted at 379), but this motion was denied by Judge Goodman. In all, four district judges played a significant role in this case; as indicated, their rulings were not entirely harmonious.

CHRONOLOGICAL STATEMENT

Petitioners have been, for varying periods of time, unlicensed seamen engaged in the maritime industry as members of the stewards' departments of west coast vessels. On June 19, 1952, an existing jurisdictional labor dispute of long standing culminated in a consent decree of the Court of Appeals for the Ninth Circuit entered in *N.L.R.B. v. Pacific American Shipowners Ass'n.*, docket No. 13,386 in the files of that Court. (R. 83-131.) This had the effect of suspending collective bargaining for the petitioners and other marine cooks and stewards on the west coast until certification of an exclusive collective bargaining agent by the National Labor Relations Board, which event occurred more than three years later. See particularly Appendix H to the Consent Decree. (R. 119, App. C, pp. 54-64.)

Instead of operating through the earlier hiring hall arrangement, the stewards department employees presented themselves to a central registration office established and operated under the consent decree by the various steamship companies through the Pacific Maritime Association, representing the employers who are respondents herein.

A referee was appointed by the Court to adjudicate grievances of the men as they arose, and no changes in wages, hours, and other working conditions could be instituted unless approved by the Court. Through the medium of the consent decree, the employers retained all of the benefits of availability of a skilled labor force which had been developed over years of

multi-employer bargaining. As had been the case in the past, some of the seamen remained in the employ of a single company for voyage after voyage of the same vessel; others worked for different companies on different vessels, for varying lengths of time.

Because collective bargaining was suspended, wages were effectively frozen; as time passed, despite some increases, petitioners' wages lagged farther and farther behind those of unlicensed personnel of the deck and engine room departments on the same vessels who enjoyed the benefits of collective bargaining, although previously there had been a long-standing parity in wages between the three departments in the industry. (See R. 67-75.)

As this disparity in wages developed during the period of the consent decree, petitioners were in effect forced to continue to "ship" at the existing rates, with the expectation, based on employer assurances, of recouping the interim loss in wages after certification of a collective bargaining agent.

After the collective bargaining agent ultimately certified failed to recover the differential between what petitioners actually received and what they would have received if the collective bargaining process had not been suspended during the effective period of the consent decree, petitioners decided to sue for those amounts. They predicated their claims on the fact that the consent decree arrangement was taken advantage of by the employers to withhold wage increases and other benefits. The decision to sue presented novel questions of law and procedure, including

the practical procedural problem of how most expeditiously and economically to present the many individual claims of the over 600 petitioners against the various respondent employers. One thing was clear: the basis upon which each seaman sought recovery involved identical questions of fact and law.

Four of the petitioners (John J. Rogers, Charles Mullen, W. A. Hopwood, Jr., and Herbert Patterson) were selected to be named libelants, the remaining petitioners being listed by name on attached exhibits. (R. 16, 19, 21.) (The number of named libelants could have been one or all of the petitioners; the number selected was purely for convenience's sake and was not intended to be legally significant.) These four were authorized in writing by the remaining 650-odd seamen to represent them. (R. 17.) All respondents were also joined in the same single libel, containing four counts, filed on February 8, 1956. (R. 1-16.) All respondents had participated in the central hiring office under the consent decree.

The first two counts sought recovery to each petitioner of the wages not paid but allegedly due during the moratorium period on alternative theories of *quantum meruit* and unjust enrichment. The contributions to welfare and pension trust funds allegedly due by the respondents as a part of the unpaid compensation were not recoverable individually, and therefore the four named libelants sought recovery, by way of class action in Counts III and IV, for the benefit of the entire class of stewards department em-

ployees who had worked during the moratorium period, numbering approximately 4,000, and not limited to those who had authorized the named libelants to present their individual wage claims. The recovery sought in Counts III and IV were payments directly to the funds. Petitioners have always contended that a class suit was the only method by which the welfare and pension trust funds could be repaid amounts due them, and based on the labor of all the beneficiaries.

In short, petitioners sought, by way of their representative and class counts and by joinder of all respondents, a consolidation at the pleading stage rather than the trial stage of many thousands of claims for separate voyages, yet all having their nexus in the common, underlying circumstances of the wage moratorium and involving common questions of law and fact.

In ruling on respondents' exceptions and exceptive allegations to this libel, then District Judge Hamlin indicated, in his order filed November 16, 1956 (R. 57-61), that there was a misjoinder of parties and causes as to the individual claims, and that under Local Admiralty Rule 7 each voyage was a separate transaction, requiring that each claim of each seaman be repleaded against a single respondent, except that seamen who had sailed on a common voyage could join those claims against the particular respondent involved. Judge Hamlin also ruled that class actions could not lie in admiralty and that Counts III and IV should be dismissed.

This ruling on joinder appeared to require up to 20,000 separate libels,[2] all of which could properly be consolidated.[3] To avoid this superfluous task, petitioners filed, prior to entry of a formal order, a motion to consolidate the separate claims without separately stating them formally. (R. 63-64.) This motion and a motion to reconsider (R. 62) were denied and the order to replead and of dismissal was entered on February 12, 1957. (R. 76-78; App. C, pp. 65-67.)

Petitioners appealed from this ruling. That appeal was dismissed by the Court of Appeals below on October 29, 1957, as premature, even as to Counts III and IV which had been dismissed for lack of admiralty jurisdiction. *Rogers v. Alaska Steamship Company,* 249 F.2d 646 (9th Cir. 1957). (App. C, pp. 68-78.)[4]

In their memorandum in opposition to respondents' motion to dismiss in *Rogers I,* petitioners, having construed the order of Judge Hamlin to require the filing of separate libels as to all but one of the four named libelants, argued that the order was in effect a judgment of dismissal as to all others in the pending libel. The Court of Appeals below, however, explicitly negatived this construction of the order, Circuit Judge

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[2]Thus, assuming only 600 seamen who sailed on one voyage for each of the then 33 named respondents and that none of them had sailed on any of the relevant voyages together, approximately 19,800 separate libels could have been filed.

[3]Indeed, in the second appeal, the Court of Appeals below relied on the fact that the various causes could ultimately be consolidated as an argument against petitioners' contention that this construction of Judge Hamlin's ruling was unreasonable. See R. pp. 608-609, App. B, p. 21.

[4]Hereinafter referred to as *Rogers I.*

Lemmon stating that Judge Hamlin had "meticulously *instructed* them how to take their second bite at the forensic cherry." 249 F.2d at 648. On remand, therefore, petitioners concluded that their previous construction of Judge Hamlin's order to replead was erroneous and that what the order required was the statement of separate claims of each seaman against each respondent but *within the pending libel* in accordance (by analogy) with this Court's early opinion in *Oliver v. Alexander,* 31 U.S. (6 Pet.) 143, 148 (1832). The information necessary for compliance, in any event, required extensive detailed employment data which was extremely difficult to reconstruct from the scattered and fragmentary memories of the 650-odd petitioners. Accordingly, on March 1, 1957, petitioners propounded interrogatories to respondents to get the necessary information from their employment records. (R. 134-135.) (These were readily available because of the central registration office and hiring procedure in effect during the relevant period under the consent decree. See Appendix H of the decree at App. C, pp. 55-63.) Respondents' exceptions to the interrogatories were sustained by Judge Goodman on February 5, 1959, on the ground that no claims had yet been stated. (R. 158-161.)

As a substitute, petitioners then sought to set up a pilot case to test the substantive merits of the issues involved, with the remaining claims to be held in abeyance. This was done by filing a (First) Amended Libel on March 19, 1959, on behalf of one of the original named libelants, John J. Rogers, alone. (R. 166-176.)

This libel was confined solely to Rogers' individual wage claims against the respondent American President Lines, itemized as to various voyages for that company during the moratorium period. The class action counts were not repleaded.

On the same day, the other petitioners, including named and represented seamen in the original libel, moved to be joined or to intervene as parties. (R. 162-165.) Respondents opposed this motion, and on May 6, 1959, Judge Harris denied the motion (R. 179-180), considering himself bound by prior rulings, but reserved the right to consider Rogers' case as a pilot case at a pre-trial conference after the other petitioners had adequately stated their claims. (R. 575-576, 581.) Judge Harris extended time to file amended pleadings in order to allow petitioners time to secure the necessary information from the only other practical source, the United States Coast Guard office of the Merchant Vessel Personnel Division, in Washington, D. C. (R. 183-194; 195-196; 207.)

In connection with Judge Harris' ruling, one of counsel for petitioners made clear to him that petitioners' view was that they were to file amended pleadings *within the pending libel*, to which Judge Harris expressed his agreement. (R. 575-576.)

Further orders for extension of time to replead were granted, and a Second Amended Libel was filed on January 14, 1960 (R. 296-528) to which a supplement was filed on January 28, 1960. (R. 215-222.) This pleading stated, again by way of the common counts, the separate individual wage claims of all the

650 petitioners save Rogers, set forth in detailed attached schedules (Exhibits A-III) which listed the specific voyages on which each seaman had served, on specifically named vessels, operated by the respective respondents. (R. 302-528.) The class action counts were not repleaded.

Respondents moved to dismiss this libel on the ground that it did not comply with previous orders. (R. 213-214.) Judge Goodman dismissed the Second Amended Libel on February 10, 1960 for improper joinder of parties and causes of action and for failure to tender claims "in the manner prescribed by previous orders." (R. 226-229; App. B, p. 31.)

Petitioners appealed from Judge Goodman's judgment of dismissal of the Second Amended Libel, and from Judge Hamlin's original order to replead and judgment of dismissal of the original class action counts.[2] In the meantime, the severed individual claims of Rogers were pursued. While *Rogers II* was pending, Judge Wollenberg, on May 31, 1960, sustained respondent American President Lines' exceptions to the (First) Amended Libel, on the grounds, in essence, that the common counts do not satisfy Admiralty Rule 22, at least where there exist written articles and releases executed pursuant to 46 USC §§ 564, 644. (R. III, 17-20.) Rogers elected to stand on his pleadings, which included his verified Reply to Exceptive Allegations (R. III, 12-16), and the (First)

[2] This was docketed in the Court of Appeals below as *Rogers v. Alaska Steamship Company*, No. 16,862, and is referred to hereinafter as *Rogers II*.

Amended Libel was dismissed on September 2, 1960. (R. III, p. 35.) A third appeal was taken from this judgment,[6] and the Court below affirmed (June 5, 1961), ... F.2d ..... (App. B, pp. 25-31.)

Since *Rogers II* and *Rogers III* were merely two parts of the same case, petitioners sought in the Court below to have the two appeals consolidated on October 19, 1960. This motion was denied by the Court of Appeals below on October 27, 1960, and the two appeals were pursued independently.

On January 27, 1961, the Court of Appeals entered its judgment in *Rogers II* affirming the dismissal by Judge Goodman, and holding that petitioners could not now question the validity of Judge Hamlin's order. It held further that the dismissal was proper as to the remaining original named libelants (Mullen, Hopwood and Patterson). The Court of Appeals held, however, that the dismissal as to the other 650-odd petitioners, (being the seamen named on the exhibits to the original libel) was not an adjudication on the merits and therefore they might further pursue their claims "in any independent suits which they may see fit to institute." (R. 607, App. B, p. 19.) The Court of Appeals refused, however, to indicate whether such future suits would be subject to a defense of laches. (R. 607, App. B, p. 19.)

The opinion of January 27, 1961, although mentioning them as one of the issues on appeal failed to

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[6]This appeal was docketed in the Court of Appeals below as *Rogers v. American President Lines*, No. 17,110, and is hereinafter referred to as *Rogers III*.

discuss further the class action counts of the original libel. A petition for rehearing was filed on February 24, 1961, which raised this omission and other matters. The petition for rehearing was denied on April 4, 1961, with a supplemental opinion disposing of the class action on the basis that none of the original libelants nor the others originally represented had present standing to establish their claims. (R. 612-613, App. B, pp. 22-24.)

On June 5, 1961, the Court of Appeals for the Ninth Circuit filed its decision in *Rogers III*, upholding Judge Wollenberg's dismissal of the (First) Amended Libel of Rogers on the ground that Admiralty Rule 22 of this Court precludes the use of the common counts in admiralty when shipping articles and releases are executed. Articles and releases for each voyage made by a seaman are required by statute, are primarily for the benefit of the seaman, and, according to petitioners, were never intended to define their compensation for work done, a function usually of the collective bargaining agreement.

This consolidated petition seeks review of the decisions of the Court of Appeals in *Rogers II* and *Rogers III*.

REASONS FOR GRANTING THE WRIT

A common thread runs through the decisions of the lower Courts in this case. This thread is a preoccupation with Procrustean technicalities, and a re-

fusal to accommodate adjective law to impelling realities. The more than 600 seamen who sought the assistance of admiralty in recovering wages rightfully due them find themselves before this Court more than five years after their suit was commenced without yet having opened the door to a determination of the substantive merit of their claims.

When the reason for such an impasse is quite simply what would appear to be a determined hostility on the part of the lower Courts to long-accepted admiralty principles, it would seem that the occasion has arisen for the exercise by this Court of its supervisory jurisdiction over the lower Courts.

Ever since the claimants here filed their original libel on February 8, 1956, there has been no genuine doubt concerning the nature of their claims, the manner in which the wages and welfare and pension fund payments claimed to be due them should be computed, and the theory upon which they sought recovery. The original libel covered all of these essential elements of a cause of action. Yet, at every step of the case, libelants have been thwarted in their attempt to have their claims adjudicated on the merits.

Libelants sought to review the initial determination of Judge Hamlin that each voyage constituted a separate transaction within the meaning of the admiralty rules concerning joinder. They were told by the Court of Appeals that this attempt to review was premature, and that they should replead. When they did so finally, after several attempts to persuade the

District Court that a separate statement of each seaman's claim would simply burden the files of the Court with mountains of paper, they found themselves then confronted with a dismissal because they had not pursued a course suggested by Judge Hamlin as an alternative course only. In short, when libelants finally did separately state by each voyage the thousands of claims which existed as a result of their underpayment, they were told that this was improper. The reason given was that they had not complied with Judge Hamlin's order; yet, Judge Hamlin's order would have required them to combine the separate claims per voyage finally stated in a fashion wholly unnecessary for clarity and wasteful of time and effort once separate statements of each claim were determined upon.

Only the common thread of slavish adherence to technicalities explains other actions of the Courts below. One of the main questions on appeal in *Rogers II* was whether a class action would lie in admiralty, and thus permit the repayment to the welfare and pension funds of the sums due under libelants' theory of the case. The Court of Appeals did not even discuss this question in its opinion in *Rogers II*. When this was pointed out on petition for rehearing, the question was again not discussed on its merits, but determined to be moot because the pleadings on the first two counts of the libel were found defective on wholly procedural grounds. Surely such an abdication of appellate responsibility by a Court of appeals merits

an exercise by this Court of its supervisory jurisdiction.

As we have already pointed out, libelants sought to review Judge Hamlin's ruling that each voyage constituted a single transaction. The appeal from this ruling was dismissed as one from a non-appealable order, and the Appellate Court directed libelants to replead. There was no intimation in the opinion in *Rogers I* that such a course would waive libelants' right at a later stage to have appellate review of Judge Hamlin's order. Yet, when Judge Goodman's judgment of dismissal was appealed, libelants learned that they had forfeited their right to review Judge Hamlin's order because they had obeyed the directions of the Court of Appeals when their appeal was dismissed in *Rogers I*. This alone would merit a review by this Court.

But the circle of frustration was not yet complete. This was accomplished by the opinion in *Rogers III*. Having been taught by the Court of Appeals in *Rogers II* that to amend one's pleadings waives one's right to test the validity of the original pleading, libelants appealed the ruling of Judge Wollenberg that the common counts did not lie in admiralty. Again, in *Rogers III* the Court of Appeals upheld the ruling of the district judge. Instead of remanding the case to the District Court to give libelants a new opportunity to replead, the Court of Appeals affirmed the dismissal below and threw libelants out of Court entirely. The Appellate Court thus abdi

cated completely its responsibility to help minimize the danger of any fatal consequences flowing from a wrong choice by a litigant, especially in an area yet relatively uncharted in admiralty practice. Such a "damned-if-you-do-and-damned-if-you-don't" approach is alien to admiralty and its treatment of seamen. When it is manifested as thoroughly as it has been in this case, the time has come for this Court to order a halt.

Let us briefly consider the specific questions presented. Petitioners maintain that class actions may lie in admiralty. The District Court dismissed Counts Three and Four of the original libel on the ground that express authority for a class suit in admiralty had not been shown, and also because there were cases which "negate(d) any such procedure." (R. 60.) Petitioners sought vainly, in *Rogers I* and *Rogers II*, to demonstrate to the Court of Appeals below that the cases relied on by the District Court were erroneously interpreted and moreover inapposite. The cases relied on by the District Court, *The Roosevelt* (D.C.S.D.N.Y. 1938), 23 F.Supp. 620; *Totolos v. Compania de Navegacion Cristobal* (D.C. S.D. N.Y. 1950), 94 F.Supp. 699, and the *Nico* case (D.C. Va.) 1951 A.M.C. 1190, involved cases for direct payment of wages to seamen, and not a class action for recovery of a trust fund. In the *Nico* case, moreover, it is expressly noted that no case was made for a class action and in the *Totolos* case it is emphasized that there was no allegation of a common

fund. Thus both cases, instead of negating the propriety of a class suit in admiralty, actually implicitly recognize that a class suit would be permissible given a proper case.

The fact that none of the lower Courts ever discussed this point is a demonstration of an unwillingness to face the realities of the situation which characterized the treatment of these claims at all stages of the case.

Recognizing that no General Admiralty Rule yet exists analogous to Rule 23 of the Federal Rules of Civil Procedure, petitioners urge that the same considerations which earlier resulted in equity's avoidance of the common law restrictions on class suits apply in admiralty with equal force and validity, to avoid injustice to numerous small claimants who, as representatives of an ascertainable class of seamen, seek to assert a "common" right and to recover monies for common funds.

On the issue of joinder of representative suits for seamen's wages, petitioners again were faced with procedural roadblocks due to narrow interpretation. Because the labor-management situation here presented was a novel one, and because it affected all petitioners in a substantially identical manner, petitioners attempted joinder of causes and parties on the basis of a broad interpretation of local Admiralty Rule 7(a). (Appendix A, p. 2.) Petitioners contended that the term "transaction" in said rule be deemed to encompass as one transaction the entire

course of dealings between the shipowner respondents and the stewards department personnel during the period of the Consent Decree. Then District Judge Hamlin ruled, however, that since wage claims have been traditionally based on voyages, each voyage created a separate claim constituting in turn a separate cause of action, thus precluding joinder except under very limited conditions, namely where seamen serve together on the same voyages.

The District Court was not persuaded that General Admiralty Rule 44 permitted the adaptation of local practice to cope with the novel circumstances of this case. Petitioners have already indicated in their Statement of the Case how this would have created an unnecessary and burdensome pleading problem. When petitioners attempted to have the Appellate Court review this point, they were twice thwarted. The Court of Appeals first (in *Rogers I*) ruled the appeal premature, while at the same time chiding petitioners for failing to observe that the opportunity to replead had been expressly afforded them.

Then, after petitioners separately stated their respective claims by way of the Second Amended Libel, they were dismissed with prejudice. When they again questioned the trial Court's ruling on misjoinder of parties and causes of action, the Court of Appeals swept the issue aside, stating that petitioners had waived the original point by repleading, thus completely ignoring the fact that it had earlier directed the repleading!

The intervention of this Court is impelled by the necessity to demonstrate to the lower Courts that admiralty practice and procedure can be flexible and non-technical enough, even in the absence of an express rule, to cope with new circumstances and problems presented by modern mass situations, at least to an extent equal to the analogous Rules of Civil Procedure. (Compare with this Court's new and amended Rules of Practice on discovery, April 17, 1961, subsequent to the decision in *Miner v. Atlass,* 363 U.S. 641.)

Petitioners stated their wage claims in both the First and Second Amended Libels in the form of common counts, relying upon this Court's opinion in *Archawski v. Hanioti,* 350 U.S. 532, and that of the Court of Appeals for the Second Circuit in *Martin v. Campanaro,* 156 F.2d 127, cert. den. 329 U.S. 759.

In response to exceptive allegations to the First Amended Libel, libelant Rogers filed a verified reply which, *inter alia,* refuted the contentions that the written shipping articles and statutory releases barred the wage claims.

The District Court sustained the exceptions, firstly on the basis that General Admiralty Rule 22 precluded a statement of claim by way of the common count, and secondly that the articles and releases barred recovery unless libelant stated "facts which would warrant disregard" of the written instruments.

Petitioners attempted to demonstrate to the Court below that the articles are not, under modern conditions of collective bargaining, the meaningful contract as to wages. Petitioners here relied upon this Court's opinion in *National Labor Relations Board v. Waterman SS Co.*, 309 U.S. 206, 212-213, which discusses the statutory requirements for such documents in the light of modern collective bargaining practices. However, the dismissal of the Rogers libel was affirmed by the Court of Appeals (in *Rogers III*) in an opinion which takes for granted that the shipping articles were the controlling contract of employment. The Court below completely ignored the *Waterman* case, and erred in presuming that shipping articles are inviolate. The Court below also failed to recognize the fact that 46 U.S.C. §597 authorizes the setting aside of seamen's releases. In effect, in throwing out the libel on the ground that insufficient facts had been pleaded, the Court of Appeals refused as a matter of law to permit the wage claims to be heard on the merits. Petitioners submit that Admiralty Rule 22 must be construed in the light of *Archaiwski v. Hanioti,* and if the common counts may state a cause of action in admiralty, the pleading requirement has been sufficiently met, leaving the fact determination to be made ultimately in the trial on the merits.

Judge Hamlin's order of February 12, 1957, directing separate statements of the wage claims failed to clarify whether the claims could be so stated within

the confines of the pending libel or whether many new libels would be required. The petitioners herein, who include not only the named libelants in the original libel filed February 8, 1956 but also the approximately 650 other seamen who first appeared in a representative manner on exhibits to the original libel, ultimately stated their separate claims by voyage, dates, employment rating, and separately named employer respondents in the Second Amended Libel. The dismissal of the Second Amended Libel for allegedly running counter to previous orders of the District Court was affirmed by the Court of Appeals, which ignored the obvious fact that in order for there to be a non-compliance with previous Court orders, the latter ought to be not only clear but consistent. Unfortunately, they were neither, let alone being free from error. Petitioners have consistently attempted in good faith to state their respective wage claims in order that the merits of those claims could ultimately be reached at a trial on the facts. A mere reading of the case chronology establishes this good faith effort. Petitioners may have misread the previous orders calling for repleading, but they ought to be excused in such misinterpretation where even the District Court judges treating with those orders (at least three such judges were involved in such interpretation), viewed the problem in contradictory fashion,[7] sufficiently so that a dismissal with prejudice under

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[7]See colloquy between Judge Harris and one of counsel for libelants, R. 575-576.

such circumstances is more than an abuse of discretion; it is a deprivation of due process under the Fifth Amendment.

Because of the importance of this case in terms of admiralty practice and procedure, this Court should intervene to correct error below.

CONCLUSION.

For the foregoing reasons this consolidated petition for writ of certiorari should be granted.

Dated, August 23, 1961.

ALLAN BROTSKY,
RUBIN TEPPER,
McMURRAY, WALKER & TEPPER,
RICHARD A. BANCROFT,
Counsel for Petitioners.

(Appendices A, B and C Follow)

[General Admiralty Rules]

Rule 22. (Requisites of libel in instance causes.)

All libels in instance causes, civil or maritime, shall be on oath or solemn affirmation and shall state the nature of the cause, as, for example, that it is a cause, civil and maritime, of contract, or a tort or damage, or of salvage, or of possession, or otherwise, as the same may be; and, if the libel be in rem, that the property is within the district; and, if in personam, the names and places of residence of the parties so far as known. The libel shall also propound and allege in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the respondent or claimant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer for due process to enforce his rights in rem, or in personam, as the case may be, and for such relief and redress as the court is competent to give in the premises.

Rule 44. (Right of trial courts to make rules of practice.)

In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of

justice, provided the same are not inconsistent with these rules.

[Local Admiralty Rule]

Rule 7. (Joinder and Intervention.)

(a) Parties may sue and parties, including a res, may be sued either jointly, severally or alternatively in one suit, and persons having separate causes of action may join in one suit if the causes of action involve substantially the same questions and arise out of the same transaction.

(b) Persons who, under paragraph (a), might have joined as co-libelants, persons entitled to participate in the recovery; and, in suits for wages, any other seamen claiming wages for the same voyage, not made parties in the original libel, may be admitted, upon petition, to prosecute as co-libelants upon such terms as the Court may deem reasonable.

[Federal Rules of Civil Procedure]

Rule 23. (Class Actions.)

(a) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce

that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

[United States Constitution]

Amendment V—(Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property.)

No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

Appendix B

United States Court of Appeals
for the Ninth Circuit

John Rogers, et al., Appellants, vs. Alaska Steamship Company, et al., Appellees.	No. 16,862 Jan. 27, 1961

Appeal from the United States District Court for
the Northern District of California
Southern Division

Before: Hamley, Jertberg and Koelsch,
Circuit Judges

Hamley, Circuit Judge:

This is a suit in admiralty brought by and on behalf of seamen to recover additional wages and contributions to certain trust funds on the alternative theories of quantum meruit or unjust enrichment. The district court entered a final decree severing the claim of one of the libelants and dismissing the action as to all other libelants. The latter now appeal, raising questions concerning abuse of discretion in dismissing the second amended libel, the necessity of findings of fact and conclusions of law, the joinder of parties

and causes, and the appropriateness of class suits in admiralty.

This case is an outgrowth of labor conditions which existed in the maritime industry on the west coast from June 19, 1952, through mid-October 1955. Immediately preceding June 19, 1952, the National Union of Marine Cooks and Stewards was recognized by the Pacific Maritime Association[1] as the exclusive bargaining representative of the unlicensed personnel serving in the various stewards departments of west coast vessels. For the forty-month period beginning June 19, 1952, however, these employees were hired and worked pursuant to the terms of a consent decree of this court.[2]

During this period the collective bargaining process was suspended. The purpose was to withhold collective bargaining until the National Labor Relations Board certified a union as the exclusive representative for collective bargaining purposes. Instead of operating through the earlier hiring hall arrangement, the stewards department employees presented themselves to a central registration office established and operated by the steamship companies. These employees were there registered and dispatched to jobs on the vessels of the various participating employers.

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[1]Pacific Maritime Association represented the steamship companies which are the respondents and appellees in this action.

[2]The consent decree was entered in N.L.R.B. v. Pacific American Shipowners Ass'n, docket No. 13,386 in the files of this court. An unrelated matter dealt with by this court in that case is reported in 218 F.2d 913.

Libelants allege that the consent decree arrangement was taken advantage of by the employers to withhold wage increases and other benefits to which libelants claim they are entitled. This contention is predicated upon a comparison between the treatment accorded them during this interim period with that which they claim was accorded the personnel of other departments with which there had formerly been parity.

Seeking a remedy, John J. Rogers, Charles Mullen, W. A. Hopwood, Jr., and Herbert Patterson, suing on behalf of themselves and others, filed a libel in admiralty against thirty-three employer respondents. The libel, which was filed on February 8, 1956, was stated in four counts.

The purpose of the first two counts was to obtain a monetary recovery for the individual libelants and for each of 275 other seamen whom they purported to represent. Such recovery was to be measured by the difference between the wages and other benefits which each had received during the forty-month period and the reasonable value of their respective services during that period. It was libelants' theory that this difference is reflected in the percentage increases and benefits which were paid to the unlicensed deck and engine room personnel aboard the same vessels during the relevant period. The first count was grounded on an implied-in-fact quantum meruit theory; the second was alternatively based on an unjust enrichment, implied-in-law theory.

In the third and fourth counts the four named libelants sought to state a class action on behalf of themselves and some 4,000 seamen similarly situated. The purpose of these counts was to obtain recovery for the benefit of a stewards department health and welfare trust fund and a stewards department pension trust fund with respect to the contributions allegedly due and unpaid from the thirty-three respondent steamship companies. The third count was based on a quantum meruit theory; the fourth was alternatively based on an unjust enrichment theory.

Exceptions were filed by certain respondents alleging procedural and substantive defects in the libel described above. The district court dealt with these in an order filed on November 16, 1956.

As to counts one and two, the procedural exceptions were directed to an alleged misjoinder of the four named libelants, thirty-three respondents, and causes of action, and the asserted impropriety of the four named libelants representing other seamen. By this time the number of seamen whom the four libelants sought to represent in the first two counts had grown from 275 to about 400, and was ultimately to reach 650.

Concerning the misjoinder question, the district court referred in its opinion and order to rule 7(a), Local Admiralty Rules, United States District Court, Northern District of California, where the libel was filed. It is provided therein that parties and causes of action may be joined "if the causes of action in-

volve substantially the same questions and arise out of the same transaction."

The court held that in so far as the first two counts were concerned, each voyage was a separate transaction between a seaman and the ship owner. It was therefore concluded that the causes of action stated in those counts did not arise out of the same transaction; therefore joinder of the four named seamen, the thirty-three respondents, or the causes of action was precluded.

With regard to the question of whether the four named libelants could represent several hundred others, the court noted in its order of November 16, 1956; that the four had written authorizations from the 650. It was therefore held that the suit could be brought on behalf of the other seamen "if the named libelant and those from whom he has such written authority sailed on the same voyage or voyages together."

Based on these and other conclusions of law stated in the order of November 16, 1956, it was therein ordered that counts three and four of the libel be dismissed. As to counts one and two, it was ordered that the causes of action of each of the four named libelants be completely severed, and that directions be given as to how the parties and causes of action could be joined in an amended libel. The court also directed that a further order be prepared to evidence these rulings.

Motions for reconsideration and for consolidation of causes of action were thereafter made. On Feb-

ruary 12, 1957, an order was entered denying these motions and confirming and formalizing the rulings contained in the opinion and order of November 16, 1956. Counts three and four were dismissed, and as to counts one and two it was ordered

> ". . . that the exceptions of said respondents, with respect to Counts One and Two of the libel herein to the misjoinder of libelants, respondents and causes of action, be and the same hereby are sustained; that the libelants shall have sixty (60) days to file amended pleadings in which the causes of action of each of the four named libelants shall be completely severed, both as among themselves and as to each of the respondents against whom they have a claim, with the exception that any two or more of the four named libelants may join their claims against one respondent with respect to one or more voyages on which they served together and any one of the four named libelants may sue with respect to one or more voyages on behalf of himself and those with whom said libelant sailed on the same voyage or voyages and whom said libelant has written authority to represent in this action, but not otherwise . . ."

Libelants appealed from the order of February 12, 1957. On March 1, 1957, while this appeal was pending, libelants filed and served interrogatories directed to each of the respondents.[3] Several of the respond-

[3]The interrogatories were as follows:

"1. State whether, as to each libelant herein and each person named in Exhibit A to the libel herein, as supplemented through October 25, 1956 (some 600 seamen) such person was employed in the stewards department of any vessel owned,

ents filed objections to these interrogatories, but no action was taken thereon during the pendency of the appeal. On October 29, 1957, the appeal was dismissed on the ground that the order of February 12, 1957, was not a final order. Rogers v. Alaska Steamship Co., 9 Cir., 249 F.2d 646.

There ensued a period of settlement negotiations which eventually proved fruitless. During this period orders were entered on five different occasions giving libelants additional time in which to file amended pleadings. The objections to the interrogatories were then brought on for hearing. The principal objection made by respondents was that the interrogatories were premature inasmuch as there was then no libel on file in which any specific claim was asserted against any of the respondents.

Libelants resisted this objection by asserting that they were unable to file amended pleadings in accordance with the order of February 12, 1957, until they had the information sought by the interrogatories. They further asserted that the interrogatories afforded the only practical means of obtaining the information.

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chartered, managed, operated, navigated or controlled by you during the period from June 19, 1952 through October 15, 1955.

"2. If, as to any such person, the answer to the preceding interrogatory is in the affirmative, state as to each such person

(a) the name of the vessel on which employed,

(b) the voyage number or numbers during which employed,

(c) the period or periods during which employed for each voyage number or numbers, and

(d) the job classification in the stewards department for which employed for each such voyage."

On February 5, 1959, the district court entered an order sustaining the objections to the interrogatories. In the same order libelants were given twenty days in which to file amended pleadings subject to modification upon a showing of good cause.

On March 19, 1959, John J. Rogers, one of the four original libelants, filed an amended libel on his own behalf only and against respondent American President Lines, Ltd., only. Eighteen counts were stated, two each with respect to nine separate voyages of a steamship operated by that respondent. The amended libel filed by Rogers was thereby in effect severed from all other parties and causes of action involved in the original suit and thereafter proceeded on its separate way. It is sufficient to note that the second amended libel of Rogers was thereafter dismissed and an appeal from the order of dismissal is now pending in this court in docket No. 17,110.

On the same day that Rogers filed his amended libel the 650 seamen whom the four original libelants had sought to represent in counts one and two of the original libel joined in a motion for leave to become parties libelant, or in the alternative to intervene as parties libelant in the initial proceeding. The alleged purpose in making this motion was to permit the Rogers libel to proceed as a "pilot" case to be heard on the merits. The motion was denied, after hearing, on May 6, 1959.

In the order of denial libelants other than Rogers were given until September 1, 1959, to file amended pleadings "in conformity with the . . . orders of No-

vember 16, 1956, February 12, 1957, and February 5, 1959." It was provided that no modification of the previous orders was intended; the right to obtain a pretrial conference was preserved. The order expressly stated that it was without prejudice to any defenses which any respondent might have.

On July 17, 1959, the district court entered an order requiring the San Francisco office, Merchant Vessel Personnel Division, United States Coast Guard, to furnish certain information to the proctors for libelants.[4] On August 31, 1959, libelants, except Rogers, were granted a further extension of time to November 1, 1959, within which to file amended pleadings.

Libelants thereafter moved once more for an extension of time within which to file amended pleadings. After hearing, an order was entered on December 30, 1959, extending such time to January 15, 1960. Consistent with the order of May 6, 1959, it was provided in this order that the amended pleadings were to be "in strict conformity to and compliance with" the orders of November 16, 1956, February 12, 1957, and February 5, 1959, that no modification of those orders was intended, and that the extension of time was without prejudice to any defense any respondent might have. This extension order also expressly provided that no further extension would be granted and

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[4]The information to be furnished was of the same general character as that sought to be elicited by the interrogatories. See footnote 3. Such information was required as to each seaman from whom the proctors had written authorization.

that if amended pleadings in strict conformity with prior orders were not filed by January 15, 1960, the suit would be subject to dismissal.

On January 14, 1960, a second amended libel in personam was filed. In this pleading the 650 seamen whom the four original libelants had sought to represent in counts one and two of the original libel were themselves named as libelants, and of the original four libelants only Rogers was named as a party. Two of the original libelants, Mullen and Hopwood, were thereafter named as libelants in a supplement to the second amended libel filed on January 28, 1960.[5]

This amended pleading also named sixty-six respondents, only twenty-three of whom were named as respondents in the original libel. This amended pleading restates only the claims set out in the first and second counts of the original libel. It pertains to numerous voyages over a period of three years, specifically enumerated in schedules attached to the amended pleading.

The district court heard argument on exceptions filed against the amended pleading. As a result, that court on February 16, 1960, entered a final decree in admiralty severing the individual claims of Rogers, and dismissing the actions as to the remaining causes

[5]Mullen's claims, as listed in this supplement, related to nine voyages on vessels operated by three different respondents. Hopwood's claims related to ten voyages on one vessel operated by one respondent.

of action against all respondents. The reasons for the dismissal, as recited in this decree, are quoted in the margin.[6]

The four original libelants, in their own behalf and on behalf of the other 650 seamen, have appealed. They challenge the validity of the decree of February 16, 1960, and the previous orders adverse to them, particularly the order of February 12, 1957. Concerning the decree of February 16, 1960, it is first argued that the district court abused its discretion in dismissing the second amended libel. Three reasons are advanced in support of this contention, the first being that the district court erred in its interpretation of the previous orders of the court.

As indicated by the recitals contained in the decree of February 16, 1960, quoted in part in footnote 6, the district court held that the second amended libel did not comply with the directions contained in pre-

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[6] "The Second Amended Libel filed on January 14, 1960, does not tender any claims by the original four libelants either in their own behalf or in a representative capacity in behalf of other seamen in the manner prescribed by previous orders of this Court. For the first time, four years after the commencement of this action, the amended libel names as libelants some 600 seamen whom the four original libelants had previously sought to represent and names as respondents many shipping companies not heretofore named.

"Thus the Second Amended Libel not only improperly joins causes of action arising out of unrelated contracts of employment, but also comes too late. All of the information required to present the claims of the 600 seamen as they are now presented has been available in the records of the Coast Guard since the commencement of this action. Since the order of this Court entered on November 16, 1956, the presently named libellants have been apprised of the limitations inherent in the presentation of their claims in a representative suit. Yet, they have delayed more than three years to file the amended libel in their own behalf."

vious orders of the court. This noncompliance, the district court indicated, resulted from the lateness of the amended pleading and from the fact that the amended pleading (1) did not tender any claims in the manner prescribed by previous orders, (2) named as libelants some 600 seamen whom the four original libelants had previously sought to represent, and (3) named as respondents many shipping companies not theretofore named.

In order to determine whether the district court thereby misinterpreted previous orders of the court, it is necessary to review the provisions of previous orders with regard to each of the three matters noted above. Concerning the first of these, the basic previous order to be considered is that of February 12, 1957. In that order, quoted in part at an earlier point in this opinion, directions were given as to how the original libelants would be permitted to tender claims in an amended pleading, "but not otherwise."

The order of February 12, 1957, contemplated that only the original four libelants could file amended pleadings. Only one of them, Rogers, was named in the second amended libel filed on January 14, 1960. As previously noted, however, he was then proceeding separately and asserted no claim in this amended libel. Two of the original libelants, Mullen and Hopwood, were named in a supplement to the second amended libel filed on January 28, 1960. This supplement, however, was filed thirteen days after the final deadline for the filing of amended pleadings, as set in the order of December 30, 1959. It was filed three days

after respondents had filed a notice of motion and motion to strike and dismiss the second amended libel.

The order of February 12, 1957, also contemplated that the causes of action of each of the four named libelants should be completely severed, both as among themselves and as to each respondent, with exceptions to be discussed below. In the second amended libel, as supplemented, however, the causes of action of the two original libelants still in the case[7] were not completely severed, either as between themselves or as to individual respondents.

They were not completely severed as between themselves because the only two remaining original libelants, Mullen and Hopwood, were joined as libelants in the same amended libel. The fact that in this pleading it was requested that the claims of individual libelants be regarded as separate causes of action did not effectuate a complete severance as to such libelants. Such a severance could be accomplished only by filing separate amended libels.

The causes of action were not completely severed as to individual respondents because sixty-six respondents are named in the second amended libel. One of these was named in connection with libelant Hopwood's claims and three others were named with respect to libelant Mullen's claims.

Nor is the failure to completely sever the causes of action as to libelants and respondents excused under

[7]This is on the assumption that Mullen and Hopwood were still in the case despite the tardy inclusion of their names in the second amended libel.

either of the exceptions provided for in the order of February 12, 1957. The first exception permits two or more of the original libelants to join their claims against any one respondent with respect to one or more voyages on which they served together. But in the second amended libel, as supplemented, Mullen and Hopwood do not assert any claims against the same respondent.

The second exception permits any of the four original libelants to sue with respect to one or more voyages on behalf of himself and those with whom the libelant sailed on the same voyage or voyages and from whom such libelant has written authority. But in the second amended libel, as supplemented, neither Mullen, Hopwood, nor any other named libelant purports to sue on behalf of any other seaman.

We conclude that in holding in its decree of February 16, 1960, that the second amended libel does not tender any claims in the manner prescribed by previous orders, the court did not misinterpret the previous orders of that court.

We reach the same conclusion with respect to the holding of the court that noncompliance with previous orders was manifested by the inclusion in the second amended libel of 650 libelants not previously named, and numerous respondents not previously named.

In its order of May 6, 1959, the district court had denied a motion made on behalf of these 650 seamen that they be granted leave to become parties libelant, or in the alternative to intervene as libelants. The

attempt in the second amended libel to add these 650 seamen as parties libelant was in complete disregard of this order of denial and constituted noncompliance therewith.

No order was ever sought or obtained granting leave to add as parties respondent any of the respondents whose names appear for the first time in the second amended libel. Absent such an order the inclusion of these new respondents constituted noncompliance with the order of February 12, 1957. It also constituted noncompliance with the order of December 30, 1959, which required that amended pleadings be in strict conformity to and compliance with the order of February 12, 1957, and other orders.

We therefore hold that in so far as the decree of February 16, 1960, represents the district court's interpretation of previous court orders that court did not err or abuse its discretion.

Appellants argue that the district court abused its discretion in holding in the decree of February 16, 1960, that the 650 seamen were "too late" in asserting their claims in the second amended libel. Under all the circumstances recounted above, we believe that this was an appropriate conclusion in so far as participation in the instant action is concerned. But whether it is or not, the noncompliance with previous orders, as discussed above, provided adequate ground for the decree of dismissal.

Appellants also contend that the district court abused its discretion in failing to provide in the de-

cree of February 16, 1960, that the dismissal did not constitute an adjudication on the merits. The decree is final in form and it is appropriately so with regard to the four original libelants.

However, with regard to the 650 seamen named libelants in the second amended libel, the decree cannot be regarded as an adjudication on the merits, whether or not that was intended by the district court. As to them the second amended libel was properly dismissed because they had never been granted leave to join in the action and because the attempted joinder was counter to previous court orders. But since these 650 seamen were thus without standing in the action, the district court could not have adjudicated the merits of their claims by foreclosing future suits on the ground of staleness. If the claims of these seamen are stale that defense will have to be presented in any independent suits which they may see fit to institute.[8]

Aside from the question of abuse of discretion, appellants challenge the decree of February 16, 1960, on the ground that it should have been but was not supported by findings of fact and conclusions of law. In

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[8]Appellees do not seem to contend that the decree of February 16, 1960, constitutes an adjudication on the merits as to the 650 seamen. They argue only that "assuming the dismissal below has this effect" these seamen have not been prejudiced. This argument goes: ". . . if the attempt by appellants to present their claims in their own capacity in this action is too late, any effort by them to commence an entirely new action would *a fortiori* be too late. . . ." We express no view as to this.

advancing this argument appellants rely upon Admiralty Rule 46½, 28 U.S.C.A.[9]

There were no facts to be found in connection with any matter which was before the court when the final decree of February 16, 1960, was entered. That decree involved no adjudication of fact but only questions of law. In civil proceedings no findings of fact would be required under these circumstances. Thomas v. Peyser, D.C.Cir., 118 F.2d 369, 374. We think the same rule applies by analogy in suits in admiralty.

The decree of February 16, 1960, is also challenged as giving finality to previous orders contended to be erroneous in which exceptions to counts one and two of the original libel were sustained and counts three and four were dismissed. As previously noted, an earlier attempt to reverse these other orders was rejected by this court as premature. The prior order to which attention is principally directed is that of February 12, 1957, described above. Appellants question the trial court's rulings evidenced by that order, that the original libel involves a misjoinder of parties and causes of action and an impermissible attempt to state a class action.

The fact which is controlling here is that the parties did not choose to let that order go to final judg-

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[9]Rule 46½:

"In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rule 49."

ment. Instead, they elected to amend. Having done so, the second amended libel was substituted in all respects for the original, and complaint may not now be made of the order which required the amendment. Studio Carpenters Local Union No. 946 v. Loew's, Inc., 9 Cir., 182 F.2d 168, 170.

The directions relative to the form of amended pleadings contained in the order of February 12, 1957, authorized joinder of libelants to the extent they were employed on the same voyage. Had amended libels consistent with these directions been filed, it is likely that the number of suits would have been further reduced by orders of consolidation. This would have been possible to the extent that similarity of claims and defenses permitted consolidations under Local Admiralty Rule No. 14.[10] Had this course been followed, the number and size of the lawsuits growing out of this controversy could have been held within reasonable bounds.

The decree of February 16, 1960, and all previous orders which were thereby made final are

Affirmed.

(Endorsed) Opinion Filed Jan. 27, 1961.

Frank H. Schmid, Clerk.

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[10]Rule 14 reads:

"When various suits are pending, all resting upon the same matter of right or defense, even though there is no common interest between the parties, the Court may order the suits to be tried together, and may order a single decree or decrees in each cause."

United States Court of Appeals
for the Ninth Circuit

John J. Rogers, et al., Appellants, vs. Alaska Steamship Company, et al., Appellees.	No. 16,862 April 4, 1961

On Petition for Rehearing

Before: Hamley, Jertberg and Koelsch, Circuit Judges

Per Curiam:

An opinion affirming was filed herein on January 27, 1961. Appellants have petitioned for rehearing, contending among other things that we should have dealt on the merits with the class action aspect of this case. As we stated in the opinion of January 27, 1961, class actions were pleaded in the third and fourth counts of the original libel. These counts were dismissed by orders of November 16, 1956, and February 12, 1957. Appellants argued that this was error.

We did not deal on the merits with the initial dismissal of any of the four counts of the libel, holding that libelants did not stand thereon but elected to amend. With regard to counts three and four, in which class actions were sought to be stated, a further explanation is appropriate.

The claims stated in these counts sought recovery for the benefit of a stewards' department health and welfare trust fund and a stewards' department pension trust fund. These are common funds of which stewards' department employees and their families are the sole beneficiaries. The relief sought under counts three and four was to require appellees to contribute to those trust funds a percentage of the additional wages to which members of the class would be entitled under the theory advanced in support of the individual wage claims asserted in the first and second counts of the libel.

The basic premise of the class counts, therefore, is that the four original libelants and the 4,000 additional seamen they sought to represent were entitled to additional wages on the theory advanced in counts one and two of the libel. There is no contention that appellees have failed to add to the trust funds the required percentage of such wages as they concede were earned. The quarrel is not over failure to comply with the trust arrangements, but over the question of what wages were earned by individual members of the class. Thus the issue presented is precisely the same under the class counts as under counts one and two, i. e., the alleged right to additional wages.

But except for John Rogers, one of the original libelants whose claim has now been severed from this proceeding, none of the original libelants or the 4,000 other seamen they seek to represent has present standing to establish a claim for such additional wages. The three remaining libelants (other than

Rogers) and the 650 seamen they sought to represent in counts one and two do not have such standing because they elected to amend their libel with regard to their claims for wages and did so in a manner which was ineffective. The remainder of the 4,000 seamen sought to be represented in the class counts have never had such standing, since the class counts did not purport to assert wage claims.

Since members of the class have either not asserted wage claims or have not done so effectively, the underlying premise upon which the class counts are based cannot be established. It would be a curious anomaly if these 4,000 seamen, while unable to establish through a class action or otherwise their right to additional wages, could nevertheless require appellees to contribute a percentage of such wages to the trust funds in question.

For this reason, if for no other, the district court's order dismissing the class counts must, under the present posture of the case, be sustained.

The petition for rehearing is denied.

(Endorsed) Per Curiam Opinion on Petition for Hearing Filed April 4, 1961.

Frank H. Schmid, Clerk.

United States Court of Appeals
for the Ninth Circuit

John J. Rogers, Appellant, vs. American President Lines, Ltd., Appellee.	No. 17,110 June 5, 1961

Appeal from the United States District Court for the Northern District of California Southern Division

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Before: Hamley, Jertberg and Koelsch, Circuit Judges

Hamley, Circuit Judge:

In this amended libel in personam brought against American President Lines, Ltd., John J. Rogers seeks to recover compensation additional to that he has already received for services rendered to respondent. Various exceptions and exceptive allegations were filed by the company, and Rogers filed a reply thereto. The court sustained some of the exceptions and granted Rogers time to file a second amended libel. He elected to stand on his pleadings, and a final decree of dismissal was entered. Rogers appeals.

Twice before related matters in this dispute have been before this court. Rogers v. Alaska Steamship Co., 9 Cir., 249 F.2d 646, ... F.2d ..... Background

facts additional to those recited herein are set out in those opinions.

In his amended libel Rogers alleged that between March 17, 1952, and December 18, 1955, he made nine voyages as a member of the stewards department on appellee's SS President Monroe. Concerning each of these voyages, Rogers alleged that appellee is indebted to him for the reasonable value of the work which he performed, less sums already paid to him by appellee for such work and less associated payments already made by appellee to certain health and welfare and pension trust funds. It was further alleged that the reasonable value of his work is equal to the wages at the basic and overtime rates actually paid plus the actual associated payments made to the trust funds,

> "adjusted upward to reflect the same percentage increases and effective dates of increase as were paid by respondent after June 19, 1952, to its unlicensed deck and engineroom department employees, and to the health and welfare trust funds and pension trust fund of which said employees were beneficiaries, for said voyage."

With regard to each voyage, and in the alternative, it was alleged in the amended libel that unless the company is required to pay Rogers the indebtedness due him, computed as indicated above, "respondent will remain unjustly enriched at the expense of libelant, contrary to all principles of equity and good conscience."

The trial court, in sustaining one of the company's exceptions, held that since Rogers was paid wages at

the rate specified in written shipping articles which he had executed, he could not state a claim for additional compensation on the basis of implied contract or unjust enrichment without alleging facts which would warrant disregard of those articles.[1]

In order to determine whether this was a correct ruling, it is necessary to review those recitals in the exceptions and exceptive allegations and in Rogers' reply thereto which bear upon this point.

It is recited in appellee's exceptions, among other things, that the libel does not state a cause of action on which relief can be granted because (a) it must be presumed, in the absence of allegations to the contrary, that the terms of employment were covered in articles, as required for foreign voyages by 46 U.S.C.A. § 564, and an action will not lie on an alleged implied contract where an express contract covers the same subject matter; and (b) the counts for unjust enrichment do not lie because the libel shows that libelant is seeking to recover for services rendered under the terms of a written contract, payment having been accepted in full satisfaction thereof as evi-

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[1]The trial court said in the order sustaining the exceptions: "Both the contract of employment of libelant and his release upon completion of the voyage must be set aside herein under some theory before libelant can successfully recover. The very least required of libelant is that he set forth the facts he relies on to avoid the ordinary meaning of the employment contract and the release. If he relies upon fraud or perhaps upon duress he must allege what facts constitute such; if he has another theory to avoid these agreements he should state it. It is a clear rule at law that averments of this nature must be by explicit pleading (F.R.C.P. 9(b).)"

denced by the execution of a mutual release and discharge.

We shall now summarize the pertinent facts set forth by the exceptive allegations. Prior to June 19, 1952, Rogers was employed under the terms of a labor contract negotiated through collective bargaining in accordance with the Labor Management Relations Act, 1947, 29 U.S.C.A. §§ 141-87. In April 1951 a dispute developed concerning the representation of Rogers for collective bargaining purposes. On June 19, 1952, a consent decree was issued by the United States Court of Appeals for the Ninth Circuit in connection with this representation dispute and an order of the National Labor Relations Board dealing with the dispute.

Attached to this decree as an exhibit was an outline of terms and conditions of employment of cooks and stewards. The decree provided, with the express approval of the employers, the NLRB, the National Union of Marine Cooks and Stewards, and the Marine Cooks & Stewards, AFL, that these terms and conditions would be immediately adopted and continued in effect until a union had been duly certified by the NLRB as the exclusive representative of employees in the stewards departments of the affected vessels.

Among other things, the outline provided that the substantive provisions of the pre-existing contract with respect to wages, rates of pay, hours of work, and other conditions of employment would remain in

effect. The decree also provided that the referee appointed for the Port of San Francisco would have the power to adjudicate grievances concerning the employment of stewards department personnel.

On each voyage involved in this suit, Rogers and the master of the vessel entered into written shipping articles executed before a shipping commissioner, in which the exact wages to be paid Rogers were specified. The wage provisions corresponded to those set forth in the outline attached to the court decree, and Rogers was paid the wages specified.

In his reply to the exceptive allegations, Rogers did not, as alleged by appellee, dispute the written terms of the consent decree. He contended, however, that this decree "did not prevent, and was not intended to prevent" the company's becoming obligated to pay him "the full and reasonable value of his services."

Rogers did not deny that he entered into shipping articles as alleged for each voyage or that he was paid according to their terms. He maintained, however, that these articles "did not specify, nor were they intended to specify, the full compensation to be paid libelant for such services."

Appellant did not take advantage of the opportunity afforded him to further amend his libel to allege fraud or duress, or to present any other ground not already advanced in pleadings on which the wage terms of the shipping articles could be avoided. The only theory upon which he relied in urging disregard

of the express terms of those articles is that since unlicensed deck and engineroom department employees received certain wage increases during the time appellant's wages were frozen under the consent decree, the company impliedly agreed to give him a like increase over and above the wages specified in the decree and in his shipping articles, and will be unjustly enriched if it fails to do so.

Since this sole theory of the case was not predicated upon any factual showing beyond the allegations just summarized, only a question of law was presented, and the suit was properly adjudicated on the pleadings.

An action does not lie on an implied contract where there exists between the parties a valid express contract which covers the same subject matter. As the Supreme Court said in Klebe v. United States, 263 U.S. 188, 192 "[a] contract implied in fact is one inferred from the circumstances or acts of the parties; but an express contract speaks for itself and leaves no place for implications." Giving application to this rule with respect to contracts implied in law as well, this court has said: "There cannot be an implied contract either in law or in fact contrary in terms to a controlling express contract." United States v. Ahearn, 9 Cir., 231 F.2d 353, 356.

Archawski v. Hanioti, 350 U.S. 532, cited by appellant, held that admiralty has jurisdiction over a libel asserting unjust enrichment. But the holding was limited to a claim of unjust enrichment arising

as a result of a breach of a maritime contract. In the case before us, no breach of contract is alleged.

Appellant argues that the rationale underlying the decision in Martin v. Campanaro, 2 Cir., 156 F.2d 127, supports his claim for recovery. But the question there involved was to determine, under the circumstances of that case, what contract "implied in fact" pertaining to wages the parties' course of conduct implied when employees continued to work as under the terms of an express contract which had expired. In the instant case, an express agreement embodied in written shipping articles specifying the full compensation to be paid was in effect during each voyage in question.

Accordingly, and without reaching other grounds relied upon by the trial court or additional grounds advanced in the exceptions and exceptive allegations, the judgment is

Affirmed.

(Endorsed) Opinion Filed June 5, 1961.
Frank H. Schmid, Clerk.

In The District Court of The United States
for The Northern District of California,
Southern Division

No. 27278

In Admiralty

John J. Rogers, et al.,
Libelants,

vs.

Alaska Steamship Company, et al.,
Respondents.

FINAL DECREE OF DISMISSAL

This action having duly come on to be heard in its regular order on the 1st day of February, 1960 upon motion that the action be dismissed, the seamen named as libelants being represented herein by proctor Allan Brotsky, Esq. and proctor Rubin Tepper, Esq. of Messrs. McMurray, Walker & Tepper, and respondents Matson Navigation Company, The Oceanic Steamship Company, and Oliver J. Olson & Co. being represented by proctors Alvin J. Rockwell, Esq. and John M. Naff, Jr., Esq. of Messrs. Brobeck, Phleger & Harrison and respondent Coastwise Line being represented by proctor Richard Ernst, Esq. and respondent American President Lines, Ltd. being represented by

Proctors Peter N. Teige, Esq. and George D. Wick, Jr., Esq. and respondent Grace Line, Inc. being represented by proctors William R. Ray, Esq. and Maynard Garrison, Esq. of Messrs. Wallace, Garrison, Norton & Ray and respondents American Mail Line, Pacific Far East Lines, Pacific Atlantic Steamship Co., Pacific [226] Transport Lines, States Steamship Co., Pacific Argentine Brazil Lines and Pope & Talbot, Inc. being represented by proctors James L. Adams, Esq. and Gary J. Torre, Esq. of Messrs. Lillick, having been argued and duly submitted for decision Geary, Wheat, Adams & Charles, and the matter and the Court having considered the entire matter, including the previous orders of this Court dated November 16, 1956, February 12, 1957, February 5, 1959, May 6, 1959, July 17, 1959, and December 30, 1959, and the Court after due deliberation, having determined:

> The Second Amended Libel filed on January 14, 1960 does not tender any claims by the original four libelants either in their own behalf or in a representative capacity in behalf of other seamen in the manner prescribed by previous orders of this Court. For the first time, four years after the commencement of this action, the amended libel names as libelants some 600 seamen whom the four original libelants had previously sought to represent and names as respondents many shipping companies not heretofore named.
>
> Thus the Second Amended Libel not only improperly joins causes of action arising out of unrelated contracts of employment, but also comes too late. All of the information required to pre-

> sent the claims of the 600 seamen as they are now presented has been available in the records of the Coast Guard since the commencement of this action. Since the order of this Court entered on November 16, 1956, the presently named libelants have been apprised of the limitations inherent in the presentation of their claims in a representative suit. Yet, they have delayed more than three years to file the amended libel in their own behalf.

And the Court having entered in writing its Order Granting Motion to Dismiss.

This Court hereby expressly determines that there is no just reason for delay in the entry of a final decree as to all seamen named as libelants in the Seamen's Libel in Personam or in the Second Amended Libel in Personam and as to all respondents named in the Seamen's Libel in Personam or in the Second Amended Libel in Personam, with the exception of the claims of John J. Rogers on his own behalf against the American President Lines, Ltd., which are the subject matter of the separate libel filed on March 19, 1959.

Now therefore it is ordered, adjudged and decreed that the claims of John J. Rogers on his own behalf against [227] the American President Lines, Ltd., which are the subject matter of the separate libel filed on March 19, 1959, be, and they hereby are, severed from this action; and

It is further ordered, adjudged and decreed that this action be, and it is hereby, dismissed as to all seamen named as libelants in the Seamen's Libel in Personam

or in the Second Amended Libel in Personam and all respondents named in the Seamen's Libel in Personam or in the Second Amended Libel in Personam, but this dismissal shall not affect the claims of John J. Rogers on his own behalf against the American President Lines, Ltd., that have been severed from this action and which are the subject matter of the separate libel filed on March 19, 1959; and

It is further ordered, adjudged and decreed that the Clerk of this Court is expressly directed to enter this final decree dismissing this action as to all said seamen and all said respondents but this entry shall in no way affect the claims of John J. Rogers on his own behalf against the American President Lines, Ltd. that have been severed from this action; and

It is further ordered, adjudged and decreed that all sureties for cost that might be assessed against respondents other than the American President Lines, Ltd. are hereby released, discharged and exonerated.

Dated: February 16, 1960.

United States District Judge
/s/ LOUIS GOODMAN

[Endorsed]: Filed Feb. 16, 1960. C. W. Calbreath, Clerk. (Entered 2-17-60.)

[228]

In the United States District Court for the
Northern District of California,
Southern Division

John J. Rogers, et al., Libelants, vs. American President Lines, Ltd., et al., Respondents.	In Admiralty No. 27278

ORDER SUSTAINING EXCEPTIONS TO
AMENDED LIBEL

Libelant, a seaman in the stewards department, has filed a libel in personam "for wages under general maritime law". The amended libel with which we are here concerned contains eighteen counts, all of which are framed as common counts, the odd numbered counts beginning with Count 1 being based on quantum meruit for the reasonable value of services rendered by libelant, each count on a specific voyage, and the even numbered counts beginning with Count 2 restating the claim for the difference between what libelant received for his services and the reasonable value of such services; these counts are based on unjust enrichment implied in law theory.

The parties, in oral argument and in numerous briefs filed herein during the progress of this litigation, admit that this seaman, on each voyage, signed

articles which clearly constitute a written contract of employment, and at completion of the voyage written releases were executed. Both of these writings were executed in accordance with laws of the United States passed for the purpose of protecting the seaman. In addition, the court may take judicial notice of the fact that this seaman, serving in the steward's department, worked under a consent decree of the Court of Appeals for the Ninth Circuit entered in the case of *National Labor Relations Board v. Pacific American Shipowners Association, etc.,* Number 13,386 in the files of the Court of Appeals.

On their face, the common counts upon which libelant relies do not satisfy the requirements of Rule 22 of the Supreme Court Admiralty Rules. Common counts arising from the common law are allowed as statements of legal conclusions, they never constitute statements of fact. Admiralty does not have a common law background and under Rule 22 of the Supreme Court Rules a libel shall "propound and allege in distinct articles the various allegations of fact upon which the libelant relies in support of his suit." In the instant case libelant argues that his pleadings adequately state libelant's claim and apprise respondent sufficiently of the nature of his claim without setting forth facts beyond the mere conclusions therein stated.

This can not be, for in this case these common counts, when considered together with the admitted facts and those of which this court can take judicial

notice, that a written contract and a written release exist, that these agreements are of a type required by and executed in accordance with the laws of the United States, do not properly state a cause of action. Both the contract of employment of libelant and his release upon completion of the voyage must be set aside herein under some theory before libelant can successfully recover. The very least required of libelant is that he set forth the facts he relies on to avoid the ordinary meaning of the employment contract and the release. If he relies upon fraud or perhaps upon duress he must allege what facts constitute such; if he has another theory to avoid these agreements he should state it. It is a clear rule at law that averments of this nature must be by explicit pleading. (F.R.C.P. 9(b).)

Thus it will be seen that even at law libelant's pleading is defective; certainly then in admiralty this pleading can not meet the more stringent test of Rule 22.

Under these circumstances respondents' exceptions to the amended libel filed herein on March 19, 1959, are sustained. Libelant is hereby granted thirty days to file a second amended libel herein.

Dated: May 31, 1960.

/s/ Albert C. Wollenberg
United States District Judge.

Appendix C

In the United States Court of Appeals
for the Ninth Circuit

No. 13,386

National Labor Relations Board,
Petitioner,

vs.

Pacific American Shipowners Association, Pacific Maritime Association, Alaska Steamship Company, American Mail Line, Ltd., Pope & Talbot, Inc., and National Union of Marine Cooks & Stewards,
Respondents.

Consent Decree

Petitioner herein having entered its decision and order in Case Nos. 19-CA-186, et al, and 19-CB-46 et al, on March 12, 1952, and having filed, on May 16, 1952, its petition for enforcement of that order, and having filed, on May 20, 1952, its motion for restraining order; respondent National Union of Marine Cooks and Stewards having filed, on May 19, 1952, its motion for an order staying the order of petitioner; employer respondents having filed, on May 19, 1952, a motion for appropriate temporary and declaratory relief, temporary restraining order, clarification and

specific instructions; the Court on May 20, 1952, having heard argument by counsel for all parties herein and opportunity having been afforded counsel for Seafarers International Union of North America—AFL, and its affiliate, Marine Cooks and Stewards—AFL, to be heard at such time and place; the entry of this decree having been consented to by the parties who have appeared in this proceeding and are directly affected hereby, the acts that gave rise to petitioner's order and this proceeding having occurred within this circuit and this Court having jurisdiction in the matter, and the Court being fully advised and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Respondent Pacific Maritime Association, successor and assign of the Respondent, Pacific American Shipowners Association, its officers, agents, successors and assigns shall,

a. Cease and desist from:

(1) Recognizing National Union of Marine Cooks and Stewards, or any successor thereto, as the exclusive representative of the employees covered by the December 2, 1948, contract, and any supplements or amendments thereof, for the purposes of dealing with them concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(2) Performing or giving effect to their contract of December 2, 1948, with National Union of Marine

Cooks and Stewards, or to any modifications, extension, supplement, or renewal thereof, or to any other contract agreement, or understanding with National Union of Marine Cooks and Stewards as exclusive representative affecting such employees entered into with said organization as exclusive representative relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(3) Entering into, renewing, or enforcing any agreement with any labor organization which expressly or in its performance requires membership in any labor organization or prevents its members from securing or retaining employees on a nondiscriminatory basis, except to the extent authorized by Section 8 (a) (3) of the Act;

(4) Encouraging membership in National Union of Marine Cooks and Stewards, or any other labor organization of the employees of their members, or discouraging membership in Pacific Marine Stewards Union, AFL, or any other labor organization of the employees of their members, by discriminating in respect to the hire or tenure of employment or any term or condition of employment of any employees (including applicants for employment) of its members, except to the extent authorized by Section 8 (a) (3) of the Act; and

(5) In any other manner interfering with, restraining, or coercing employees of their members in the exercise of the rights guaranteed them in Section

7 of the Act, or the right to refrain therefrom, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

b. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Withdraw and withhold all recognition from National Union of Marine Cooks and Stewards as the exclusive representative of any of the employees covered by the December 2, 1948, contract, and any supplements or amendments thereof, for the purposes of dealing with them concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(2) Post at its offices copies of the notice attached hereto and marked Appendix C. Copies of said notices, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by its representatives, be posted by it immediately upon receipt thereof, and be maintained by it for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to the stewards department employees of its members are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material;

(3) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from

the date of this Order, what steps it has taken to comply herewith.

2. The Respondent, Pope & Talbot, Inc., its officers, agents, successors, and assigns, shall:

a. Cease and desist from:

(1) Recognizing National Union of Marine Cooks and Stewards, or any successor thereto, as the exclusive representative of its employees covered by the December 2, 1948, contract, and any supplements or amendments thereof, for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(2) Performing or giving effect to its contract of December 2, 1948, with National Union of Marine Cooks and Stewards, or to any other contract, agreement, or understanding with National Union of Marine Cooks and Stewards as exclusive representative affecting such employees entered into with said organization as exclusive representative relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(3) Entering into, renewing, or enforcing any agreement with any labor organization which expressly or in its performance requires membership in any labor organization or prevents it from securing or retaining employees on a nondiscriminatory basis, ex-

cept to the extent authorized by Section 8 (a) (3) of the Act;

(4) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, or the right to refrain therefrom, except to the extent that such right may be effected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

b. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Withdraw and withhold all recognition from National Union of Marine Cooks and Stewards as the exclusive representative of any of its employees covered by the December 2, 1948, contract, and any supplements or amendments thereof, for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(2) Post at its offices and in the stewards department of all vessels operated by it copies of the notice attached hereto and marked Appendix D. Copies of said notices, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by a duly authorized officer or agent, be posted by it immediately upon receipt thereof, and be maintained for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places

where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(3) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

3. The Respondent, American Mail Line, Ltd., its officers, agents, successors, and assigns, shall:

a. Cease and desist from:

(1) Recognizing National Union of Marine Cooks and Stewards, or any successor thereto, as the exclusive representative of its employees covered by the December 2, 1948, contract, and any supplements or amendments thereof, for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(2) Performing or giving effect to its contract of December 2, 1948, with National Union of Marine Cooks and Stewards, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding with National Union of Marine Cooks and Stewards as exclusive representative affecting such employees entered into with said organization as exclusive representative relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of em-

ployment, unless and until said organization shall have ben certified by the Board;

(3) Entering into, renewing, or enforcing any agreement with any labor organization which expressly or in its performance requires membership in any labor organization or prevents it from securing or retaining employees on a nondiscriminatory basis, except to the extent authorized by Section 8 (a) (3) of the Act;

(4) Encouraging membership in National Union of Marine Cooks and Stewards, or any other labor organization of its employees, or discouraging membership in Pacific Marine Stewards Union, AFL, or any other labor organization of its employees, by discriminating in respect to the hire or tenure of employment or any term or condition of employment of any of its employees or applicants for employment, except to the extent authorized by Section 8 (a) (3) of the Act;

(5) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, or the right to refrain therefrom, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

b. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Withdraw and withhold all recognition from National Union of Marine Cooks and Stewards as the exclusive representative of any of its employees covered by the December 2, 1948, contract, and any supplements or amendments thereof, for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(2) Offer to Thomas J. Howard immediate stewards department employment, without prejudice to his seniority or other rights and privileges and, if no such positions are presently available, place him upon a preferential hiring list and thereafter offer him employment as it becomes available, in the manner provided for hereinafter in the Outline of Terms and Conditions of Employment of Cooks and Stewards;

(3) Post at its offices and in the stewards department of all vessels operated by it copies of the notice attached hereto and marked Appendix E. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by a duly authorized officer or agent, be posted by it immediately upon receipt thereof, and be maintained by it for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(4) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order, what steps they have taken to comply herewith.

4. The Respondent, Alaska Steamship Company, its officers, agents, successors, and assigns, shall:

a. Cease and desist from:

(1) Recognizing National Union of Marine Cooks and Stewards, or any successor thereto, as the exclusive representative of any of its employees covered by the December 2, 1948, contract, and any supplements or renewals thereof, for the purpose of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(2) Performing or giving effect to its contract of December 2, 1948, with National Union of Marine Cooks and Stewards, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding with National Union of Marine Cooks and Stewards as exclusive representative affecting such employees entered into with said organization as exclusive representative relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(3) Entering into, renewing, or enforcing any agreement with any labor organization which ex-

pressly or in its performance requires membership in any labor organization or prevents it from securing or retaining employees on a nondiscriminatory basis, except to the extent authorized by Section 8 (a) (3) of the Act;

(4) Encouraging membership in National Union of Marine Cooks and Stewards, or any other labor organization of its employees, or discouraging membership in Pacific Marine Stewards Union, AFL, or any other labor organization of its employees, by discriminating in respect to the hire or tenure of employment or any term or condition of employment of any of its employees or applicants for employment, except to the extent authorized by Section 8 (a) (3) of the Act;

(5) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, or the right to refrain therefrom, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

b. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Withdraw and withhold all recognition from National Union of Marine Cooks and Stewards as the exclusive representative of any of its employees covered by the December 2, 1948, contract, and any sup-

plements or renewals thereof, for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(2) Offer to all the employees named in Appendix A hereto, except Campbell and Responte, immediate and full reinstatement to their former or substantially equivalent positions, and to all the employees named in Appendix B hereto, except Campbell, Theusen, Responte, Siebert, Paige, Makemson, Bailey and Lantz, immediate stewards department employment without prejudice to their seniority or other rights and privileges; and, if no such positions are presently available, place them upon a preferential hiring list and thereafter offer them employment as it becomes available, in the manner provided for hereinafter in the Outline of Terms and Conditions of Employment of Cooks and Stewards;

(3) Post at its offices and in the stewards department of all vessels operated by it copies of the notice attached hereto and marked Appendix F. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by a duly authorized officer or agent, be posted by it immediately upon receipt thereof, and be maintained by it for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Re-

spondent to insure that said notices are not altered, defaced, or covered by any other material; and

(4) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

5. The Respondent, National Union of Marine Cooks and Stewards, its officers, representatives, agents, successors, and assigns, shall:

a. Cease and desist from:

(1) Performing or giving effect to its contract of December 2, 1948, with Pacific American Shipowners Association, and its employer members or successors, or to any modification, extension, supplement or renewal thereof, or to any other contract, agreement, or understanding affecting employees covered by the aforementioned contract entered into with said employers as exclusive representative relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until it shall have been certified by the Board;

(2) Causing or attempting to cause the aforementioned employers, their officers, agents, successors or assigns, to discriminate against their employees or applicants for employment in violation of Section 8 (a) (3) of the Act; and

(3) In any other manner restraining or coercing employees of the aforementioned employers, their successors or assigns, in the exercise of the rights

guaranteed them in Section 7 of the Act, or the right to refrain therefrom, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

b. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Notify American Mail Line, Ltd., in writing, and furnish copies to the employee involved, that it has no objection to the employment of Thomas J. Howard, and notify Alaska Steamship Company in writing, and furnish copies to the individuals involved, that it has no objection to the employment of the employees named in Appendix A and Appendix B hereto, except Campbell, Responte, Theusen, Siebert, Paige, Bailey, Makemson, and Lantz;

(2) Notify Alaska Fishermen's Union, in writing, and furnish copies to the employees involved, that it has no objection to the clearance for employment of the individuals on its April 11, 1949, letter to that union;

(3) Post in conspicuous places at its hiring halls, and all places where notices to members are customarily posted, copies of the notice attached hereto and marked Appendix G. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by a duly authorized officer or agent, be posted by it im-

mediately upon receipt thereof, and maintained for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(4) Mail to the Regional Director for the Nineteenth Region signed copies of the notice attached hereto as Appendix G, for posting, the members of Pacific American Shipowners Association and Pacific Maritime Association who are parties to the December 2, 1948, contract willing, at their respective offices and in the stewards department of all vessels operated by them, in places where notices to employees are customarily posted. The notices shall be posted for a period of sixty (60) consecutive days thereafter. Copies of said notices, to be furnished by the Regional Director for the Nineteenth Region, shall after being signed as provided in paragraph 4 (b) (3) of this Order, be forthwith returned to the Regional Director for said posting; and

(5) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

6. The Outline of Terms and Conditions of Employment of Cooks and Stewards attached hereto as Appendix H shall be immediately adopted, put into effect, and continued in effect until a union has been duly certified by the National Labor Relations Board as the exclusive representative for collective bargain-

ing purposes of employees in the stewards department of vessels covered thereby.

7. This Court will appoint a referee for the Port of San Francisco and such additional referees as may be necessary. Such referee or referees shall have the power of finally adjudicating any and all disputes that may arise in connection with the execution or administration of the provisions for hiring of men and filling vacancies (Appendix H, paragraph 4) and of generally supervising the registration and hiring procedures set forth therein so as to accomplish the objective of removing any impairments to the conduct of a free and impartial election that may be ordered by the petitioner, in pursuance of the National Labor Relations Act, for the purpose of selecting and certifying an exclusive representative for collective bargaining purposes of employees in the stewards departments of vessels covered by such terms and conditions of employment. The referee appointed for the Port of San Francisco shall have, in addition to the powers hereinabove conferred, the power to adjudicate any grievance arising out of the employment of stewards department personnel and submitted to him under the terms of paragraph 3 of said outline of terms and conditions of employment.

8. The Clerk of this Court shall promptly cause an estimate to be made of the compensation and expenses of the referee or referees and shall notify the Pacific Maritime Association of the amount of his estimate, which amount shall be paid to the Clerk by said Pacific Maritime Association. From time to time

thereafter as may be necessary the Clerk shall make supplementary estimates and such amounts shall be paid to the Clerk. Upon certification of an exclusive bargaining representative for stewards department personnel covered by said outline of terms and conditions of employment the affairs of the referees shall be wound up and, after all costs of compensation and expense of the referees have been paid, the Clerk will refund to said Association any sums deposited and not so used.

The entry of this decree having been voluntarily consented to, and persons having been and being reinstated and employed in order to eliminate possible future back-pay liability,

It Is Further Ordered, Adjudged and Decreed that the petition for enforcement, insofar as it relates to the provisions of petitioner's order calling for back-pay is hereby withdrawn without prejudice. The entry of this decree and such reinstatement is without prejudice to the rights of respondents to present any and all defenses going to the existence of any liability for back-pay or the amount thereof; and such defenses shall be hereafter available to respondents with like force and effect as though this decree had not been entered.

Clifton Mathews
Homer T. Bone
William E. Orr

The undersigned consent to the entry of the foregoing decree.

National Labor Relations Board
David Karasick,
Attorney NLRB

Pacific American Shipowners Assn.
Pacific Maritime Association
Alaska Steamship Company
American Mail Line, Ltd.
Pope & Talbot, Inc.
J. Paul St. Sure

National Union of Marine Cooks & Stewards
Allan Brotsky

Marine Cooks & Stewards—AFL
Affiliated with Seafarers International Union of North America—
John Paul Jennings

(Appendices A, B, C, D, E, F and G omitted.)

Appendix H

Outline of Terms and Conditions of Employment of Cooks and Stewards

1. In accord with the Board's order, the substantive provisions of the pre-existing contract with respect to wages, rates of pay, hours of work, and other conditions of employment with preference as stated herein shall remain in effect and employees shall continue to have any rights that they may have acquired under the pre-existing contract and its supplements and amendments.

2. *As to access to ships by union representatives.* Equal treatment will be accorded to representatives of the contending unions. A reasonable and equal number of passes will be issued to representatives of each union with the customary release from liability on account of personal injury, and so forth, that may occur while they are aboard ship.

3. *Grievances.* Grievances may be presented by any employee. He may at the outset of each voyage or thereafter designate a delegate from among the ship's stewards department to represent him for the handling of any grievances aboard ship. He may consult in port with a representative of any union regarding the case. He may have such representative present, or assist in the presentation of, his case to the company representative. If the adjustment of the grievance at this step is unsatisfactory, the individual may appeal to a Port Committee step by designating

the Port Committee of a stewards department union as his representative. Appeal to the Court appointed referee is the final, or arbitration, step, where an individual may be represented by a representative of the union he has designated.

4. *Exclusive method for hiring of men and making replacements among stewards department personnel of the Companies.*[1]

(a) A central office shall be established in each port to register and clear applicants for stewards department employment and to refer applicants for employment through maritime union hiring halls or directly. These central offices shall be established and operated by the Association. The companies shall hire stewards department personnel and fill vacancies among such personnel exclusively through these central offices and in accordance with the procedure prescribed herein. A man may be registered at only one port.

(b) Initial registration will be accepted from any person who personally appears at the central registration office and is in the pool of PMA stewards department personnel, which shall be shown if he presents when so registering, (1) validated papers for stewards department ratings issued prior to April 1, 1952, or waiver thereof, and (2) evidence that he has been employed previously in stewards department

[1]As used herein, "stewards department personnel" or "stewards department employees" include all stewards department employees with the exception of concessionaries or their employees, chief stewards of passenger ships Class A and Class B, doctors, doctors assistants, food controllers, auditors of supplies and nurses.

ratings on one or more ships operated under agreement of Pacific Maritime Association or its predecessor since December 2, 1946; provided that: Registration will also be accepted from any person who presents the evidence in (b) (1) above and who, in lieu of requirement (b) (2) above, presents evidence that he was named on a charge filed with the National Labor Relations Board between December 2, 1946, and June 6, 1952, inclusive, charging MCS with having caused a PMA member company to discriminate against him in hiring in the stewards department in violation of Section 8(b) (2) of the Act, and/or charging any PMA member company with discriminating against him in hiring in the stewards department in violation of Section 8(a)(3) of the Act. A person so registered shall be entitled to have his name included on the master list hereinafter mentioned but shall not be entitled to referral to a job or employment until and unless the referee determines after investigation or hearing which substantiates by reasonable proof that such person was denied opportunity to fulfill requirement (b)(2) above because of discriminatory practices of a nature prohibited by Sections 8(b) (2) or 8(a) (3) of the Act. If the referee determines to the contrary, the name of such person shall be stricken from such master list.

(c) Registration shall commence in each port upon the appointment of a referee, but not sooner than June 23, 1952, and shall continue from June 23 to June 27, inclusive, or for five weekdays after registration commences, if it commences later than June

23. Dispatching from the central office hereunder shall commence in each port on June 30, 1952, after the completion of the revised master list as provided in (d) hereof, or as soon thereafter as the revised master list has been completed. Any man on in-patient status at a marine hospital during the initial registration period may send in a registration card and be placed tentatively on the initial master list. He may not, however, participate in the revision provided for in (d). Within two days of his discharge from in-patient status at a marine hospital he must appear at the central office and complete his registration, presenting at that time his discharge from the hospital and the material required under 4(b). Upon so timely satisfying 4(b) his tentative registration shall be validated into full registration. Should he fail to satisfy 4(b) within the two day period his tentative registration shall be cancelled.

(d) After the period of initial registration at the central office has been completed, a master list of all registrants will be prepared with one series of central office registration numbers. The names of the initial master list shall be drawn by lot. The initial registrants shall be entitled to retain their places on such list for job assignment in the manner hereinafter set forth; provided, however, each man who has designated either union hiring hall under sub-paragraph (h) may have his positions on the master list adjusted so that as among those making such arrangement, he will appear on the master list in the sequence of the time and date of his current registration

for shipping at such union hiring hall. If men designating either hall decide to make such a rearrangement of central office registration numbers, the union shall communicate this decision to the central office on the day after receipt of the initial master list, sending therewith the list of all men making such arrangement and their revised registration numbers and dates and times of current registration at this union hiring hall to confirm such revision. Such notice and list shall be posted at such hall and the central office immediately. The revised master list will thus be made in advance so that any man claiming he has been given an improper registration date or time may challenge his position as shown on the list by direct appeal to the referee. The referee shall have power to determine his challenge and make any necessary change in his position on the list.

(e) After the closing of the initial registration period, any person may register who shows he is in the pool of PMA stewards department personnel by presenting when registering the material required by paragraph 4 (b). Each such registrant shall be placed on the master list in sequence based on the time of his central office registration. The central office will also take applications beginning one week after the close of the initial registration period—from persons not satisfying 4 (b) (2) for places on a separate list of non-registrants to be used to fill jobs that cannot be filled under the 4 (j) procedure. Such applications shall be effective for 60 days but may be revalidated during the last five days of the effective

period upon appearing at the central office and requesting revalidation. Such applications shall be kept in sequence based on the date and time of initial application.

(f) Each registrant, at the time of each registration, shall signify the rating or ratings he holds and the rating or ratings (not more than three) under which he desires to sail. Lists shall be prepared and maintained in each port for each rating with the names of the registrants desiring to sail therein arranged in the master list sequence.

(g) Any employee now or hereafter employed may continue his employment provided the employer and the employee desire such continuance. Upon separation from employment any such employee may register at the central office by appearing and presenting the material required by paragraph 4(b). Such registrants shall be placed on the ratings lists in sequence based on the time of such central office registration.

(h) Upon the completion of the final assignment of the master registration numbers and thereafter at the time of registration, each man shall receive a time clock stamped registration card from the central office bearing his number. He shall thereafter be entitled to referral on the basis of such number. Each applicant must designate a place through which he can be assigned to a job. If he chooses, an applicant may designate the hiring hall of any maritime labor union. However, membership in a union or in any particular union will not be a condition of employment. No applicant will be discriminated against by

virtue of either membership or non-membership in a union or in any particular union or activity or non-activity for or against any union. Men will be assigned to jobs during shipping periods beginning at 9:00 and 11:30 A.M. and 1:00 and 4:00 P.M. each day. The central office will notify the hiring halls in advance of the jobs to be filled. The hiring halls will be immediately advised of the conclusion of the shipping period. Men who have not designated the hiring hall of any maritime labor union shall be assigned to jobs directly by the central office by telephone during the same shipping periods. Jobs may be assigned outside these shipping periods in emergency. Non-availability at the hiring hall or other place at the time the job is called during specified shipping periods shall constitute refusal of the job.

(i) Registrants entitled to referral shall be referred to job opportunities by the central office in rotation based on the sequence of job orders from the employers and the sequence of registration on the lists of employees.

(j) Should any job be rejected by all available registrants on the master list for a particular rating, the job will be assigned to all registrants on such list who have been registered for 46 days or more in the order in which their names appear on such list and each of such registrants who declines to accept the same or is unavailable shall have registration for all ratings cancelled and he must reregister at the bottom of the list. Any person accepting a referral who is rejected by the employer shall retain his position on

the central office list provided that he promptly reports his rejection to the central office. A person who has accepted a referral and fails to take the job for any reason other than rejection by the employer must on his next referral accept the job or shall lose his registration for all ratings and must reregister at the bottom of the central office list.

(k) (1) Any person who is *now* off a ship for the current trip on a "trip-off" basis and whose position is being filled by a relief man shall have a preference to return to the job at the end of the current trip either if the company's records show the man now working is a relief man or if the relief man leaves the vessel voluntarily. Each person now so off a ship shall not later than the day prior to the ship's arrival in port, file written notice at the central office of the particular job he claims, indicating the ship, the rating, and the date and reason (medical, vacation, company leave of absence, personal) he was relieved.

(2) Hereafter this preference shall be effective only where the reason for seeking relief is medical, vacation or company leave of absence and when the man wishing to hold the preference registers at the central office for reshipment to the particular job so left within 24 hours of so leaving his ship. Those who leave for medical reasons that make such registration in person impossible may so register by proxy within the period provided.

(3) A person so registered may not register for other employment and shall lose his preference if he registers for general shipping.

(4) A man who takes advantage of this preference must claim it for the next following trip by reporting at the central office not later than the day prior to the ship's arrival in port to obtain an assignment slip to the ship. The time for exercising the preference may be extended upon approval of the employer and notice thereof to the central office.

(l) The central office shall mail daily and simultaneously to each union (a) a list of men registered showing the registration number of each and the ship, voyage, dates and rating shown on the discharge he presented to satisfy 4 (b), and (b) a list of men dispatched, showing each man's name, the rating and the ship. A copy of the initial master list and of the revised master list shall be transmitted to each union upon its completion. Each union may have one observer present in the central office during the initial registration period, when he may examine the discharges presented, and while the names are drawn by lot as provided in (d).

(m) Anyone employed on a ship when picketed or laid up for not more than ten (10) days has the right, if promptly exercised to return to such employment on resumption of stewards department operations on the ship and continue therein as provided in 4(g) above. Neither registration at the central office nor dispatch in accordance with the foregoing procedure is necessary for such a person to return to such employment. This preference shall extend to those who would have been or become entitled to reship under 4(k).

5. Reinstatement of persons as provided in the order of the Board shall be made in accordance with the terms of said order irrespective of any other provision for initial registration or hiring provided for herein.

6. *Referee.* The panel of judges of the United States Court of Appeals for the Ninth Circuit, to which case No. 13386 is assigned, has been requested to name a referee for each major port to have the authority and powers stated herein. The Association will absorb all costs of compensation and expenses of the referee or referees. It will, in advance, deposit with the clerk of this Court the sum which he estimates is needed for such costs, and shall from time to time thereafter deposit additional sums in accordance with supplementary estimates of the clerk.

The referee shall determine the claims of men who are permitted to register under the 4(b) proviso, any dispute as to an individual's registration number on the final revised master list, any dispute that may arise when a man claims he was or is on a trip off, any dispute that may arise when a man claims he was an employee on a ship picketed or laid up, any dispute as to a man's qualifications for a position when the ship operator has refused to employ the applicant referred and any dispute as to the registration or referral of men in accordance with the procedures set forth herein.

The referee shall dispose of issues presented to him as quickly as possible to avoid or minimize delays in shipping of men. He need not hold formal hearings

except where acting under the grievance procedure, but shall require that affidavits or sworn statements be filed as to the facts. The unions and PMA shall have reasonable opportunity to present relevant evidence by affidavit or sworn statement.

The referee appointed for the Port of San Francisco shall have the power, in addition to those set forth above, to act as arbitrator under the grievance procedure set forth in paragraph 4.

The referee's determination of any dispute as provided herein shall be final and compliance therewith shall be deemed compliance with the Board's order and the Consent Decree entered in Case No. 13386 but such determination shall not be binding on the Board or otherwise encroach on its exclusive and original jurisdiction respecting any unfair labor practice charges that have been or may hereafter be filed with the Board based on such dispute or the circumstances giving rise to the same.

7. This outline of terms and conditions of employment of cooks and stewards may be implemented by additional shipping rules issued by Pacific Maritime Association after submission to and approval by the Board, National Union of Marine Cooks and Stewards and Marine Cooks and Stewards, AFL, affiliated with Seafarers International Union of North America, AFL.

(Endorsed) Filed June 19, 1952.

Paul P. O'Brien, Clerk.

(Endorsed) Filed May 3, 1956.

C. W. Calbreath, Clerk.

[Title of Court and Cause]

ORDER

Exceptions and exceptive allegations having been filed to the libel in the above-entitled cause by various respondents and having regularly come on for hearing on the 8th day of May, 1956, libelants being represented by Allan Brotsky, Esq., respondent American President Lines, Ltd. being represented by Peter N. Teige, Esq., respondents Matson Navigation Company, The Oceanic Steamship Company and Oliver J. Olson & Co. being represented by Messrs. Brobeck, Phleger & Harrison by Alvin J. Rockwell, Esq., respondent Coastwise Line being represented by Richard Ernst, Esq., respondent Grace Line, Inc. being represented by Messrs. Wallace, Garrison, Norton and Ray by William R. Ray, Esq., and respondents American Mail Line, Pacific Transport Lines, Inc., States Steamship Company, Pacific-Atlantic Steamship Co., Pacific Far East Line, Pope & Talbot, Inc. and Pacific [76] Argentine Brazil Line being represented by Messrs. Lillick, Geary, Wheat, Adams & Charles by Gary J. Torre, Esq., and the respective proctors having been heard in support of and in opposition to said exceptions and exceptive allegations, and the matter having been briefed and duly submitted for decision, and the court having filed on the 16th day of November, 1956 an order sustaining certain of said respondents' exceptions to the libel herein, reserving ruling on the exception which raises the question of laches and on the exceptive allegations concerning the shipping articles and releases, and directing that a further order be prepared and libelants having thereafter

filed a motion to consolidate libelants' causes of action and a motion for reconsideration and request for ruling together with affidavits in reference thereto and the motions having been presented in open court and argued by libelants and respondents on the 7th day of February, 1957 and the Court having reconsidered the entire matter and good cause appearing therefor:

It is hereby ordered that Counts Three and Four of the libel herein be, and the same hereby are, dismissed; and

It is further ordered that the exceptions of said respondents, with respect to Counts One and Two of the libel herein to the misjoinder of libelants, respondents and causes of action, be and the same hereby are sustained; that the libelants shall have sixty (60) days to file amended pleadings in which the causes of action of each of the four named libelants shall be completely severed, both as among themselves and as to each of the respondents against whom they have a claim, with the exception that any two or more of the four named libelants may join their claims against one respondent with respect to one or more voyages on which they served together and any one of the four named libelants may [77] sue with respect to one or more voyages on behalf of himself and those with whom said libelant sailed on the same voyage or voyages and whom said libelant has written authority to represent in this action, but not otherwise; and

It is further ordered that libelants' motion to consolidate libelants' causes of action and libelants' re-

quest for ruling may be, and the same hereby are, denied.

Dated: February 12, 1957.

/s O. D. HAMLIN
United States District Judge

[Endorsed]: Filed Feb. 12, 1957. C. W. Calbreath, Clerk. [78]

United States Court of Appeals
for the Ninth Circuit

John L. Rogers, et al., Appellants, vs. Alaska Steamship Company, et al., Appellees.	No. 15,556 Oct. 29, 1957

Appeal from the United States District Court
for the Northern District of California
Southern Division

Before ORR, LEMMON, and FEE, Circuit Judges.

LEMMON, Circuit Judge.

Salutary though it be, the rule that generally only final judgments are appealable in Federal courts is frequently overlooked by even experienced counsel.

It is salutary, because it protects the courts and the parties themselves from the delays, inconveniences, and frustrations incidental to piecemeal appeals.

It is overlooked, because counsel, impatient to get into a higher court, often prematurely seek appellate review.

The temptation to seek such review seems to be especially strong in the prosecution of class suits.

Such, at least, appears to have been the situation in the instant case.

1. *Statement of the Case*

For a period of more than three years ending in October, 1955, the steward's department employees of more than thirty steamship companies on the West Coast worked in accordance with the terms of a Consent Decree of this Court, filed on June 19, 1952. The instant case is a sequel to that decree.

In the libel filed in the District Court, about 400 seamen sought to recover the difference between the compensation paid them while they worked during the period of the Consent Decree, and "the reasonable value of their services". The appellants complain that they were not being "paid the equivalent of the raises received by employees in other comparable work categories" who were not paid under the Consent Decree. In the present posture of the case, however, the details of the libelant's grievances are not relevant.

Four of the seamen-claimants became the named libelants in the instant suit. They were authorized by the remaining hundreds to represent them, in their individual claims for specific amounts of wages due each. All of the companies were joined as respondents, thirty-three in number.

The libel contained four counts, which may be briefly summarized as follows:

Count One prayed for the wages due the respective seamen on a *quantum meruit* theory.

Count Two sought recovery of the same amounts because of the appellees' "unjust enrichment".

Count Three and Count Four dealt with the contributions alleged to be owed by the appellee companies not to the seamen individually but to welfare and pension trust funds. The libelants set out these latter two counts "for and in behalf of themselves and for and in behalf of the approximately 4,000 other seamen similarly situated" during the crucial period already mentioned. More specifically—

Count Three based its class demands upon the *quantum meruit* theory.

Count Four was bottomed upon "unjust enrichment".

Numerous "exceptions and exceptive allegations" were filed by the appellees. We need consider only those that were sustained by the District Judge, since the appellees have filed no cross-appeal.

On November 16, 1956, the District Judge made an order denying the motion to dismiss the first two counts, and granting the motion to dismiss the third and fourth counts. In that order, the Court said:

> "The causes of action of each of the four named libelants shall be completely severed, both as among themselves and as to each of the respondents against whom they have a claim, with the exception that any two or more of the four named libelants may join their claims against one respondent if they served together on the same voyage or voyages. Any one of the four named libelants may sue on behalf of any one of the

four hundred whom they seek to represent if those represented seamen served on the same voyage or voyages with them."

Regarding Counts Three and Four, the Court ruled:

"We have been shown no authority which authorizes a class suit as is attempted in the third and fourth counts of this libel. . . . The exception as to the class action should be sustained and the motion to dismiss should be granted as to the third and fourth counts."

Ruling further with respect to Counts One and Two, the District Judge, after repeating his previous order of dismissal as to Counts Three and Four, on February 12, 1957, held as follows:

". . . the exceptions of said respondents (appellees), with respect to Counts One and Two of the libel herein to the misjoinder of libelants, respondents and causes of action, be and the same are hereby sustained; *that the libelants shall have sixty (60) days to file amended pleadings in which the causes of action of each of the four named libelants shall be completely severed, both as among themselves and as to each of the respondents against whom they have a claim,* with the exception that any two or more of the four named libelants may join their claims against one respondent with respect to one or more voyages on which they served together and any one of the four named libelants may sue with respect to one or more voyages on behalf of himself and those with whom said libelant sailed on the same voyage or voyages and whom said libelant has written authority to present (sic) in this action, but not otherwise."

Notice of appeal from this order of February 12, 1957, was filed by the appellants on February 27, 1957.

In June and July, 1957, several of the appellees filed notices that on July 8, 1957, they would move this Court to dismiss the appeal. On the latter date, time for the filing of briefs was granted to July 18, 1957, on which date the cause stood submitted.

It is the motion to dismiss the appeal that we are now considering.

2. *The Appellants Themselves Point Out That the Rulings of the District Court Went to the "Form" and Not to the "Merits" of the Appellants' Claims.*

In limine, it should be noticed that the appellants themselves concede that the problem now before us is one of form and not of substance. At the very outset of their memorandum filed in this Court, they state:

> "It is the form of (the appellants') pleadings, and not the merits of their claims, which occasioned the rulings of the District Judge which are the subject of the present appeal."

Perhaps sensing the dangerous impact of such a concession, the brief-writer hastens to add:

> "As is so often the case with procedure, the forms by which the seamen-claimants here asserted their claims went to the nub of their ability effectively ever to do so."

While we do not desire to decide this case upon the unguarded concession of one of the parties, we do

believe that the first statement quoted above should be considered by us, *inter alia,* as one that can "set down the pegs that make this music".

3. *As to Counts One and Two, the Order is Palpably and Demonstrably Not Final and Therefore Non-Appealable.*

In discussing the effect of the Court's order as to Counts One and Two, the appellants concede "that the District Court did not expressly dismiss the parties and causes", but they add:

> "Where the effect of a court's order is to dismiss a cause, no express dismissal is necessary to make the order appealable."

As we have seen, the District Court not only did *not* "dismiss the cause", either "expressly" or in "effect", but was careful to leave the gate not merely ajar, but wide open! In fact the District Judge did everything short of actually pushing the appellants through the yawning portal when, as we have also noted, he meticulously *instructed* them how to take their second bite at the forensic cherry.

In Collins v Miller, 1920, 252 U.S. 364, 370, erroneously cited by counsel for the appellee Coastwise Line as appearing in *253* U.S., the Court said:

> "A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must not only be final, but complete. (Many cases cited.) And the rule requires that the judgment, to be appealable, should be final not only as to all the parties, but as to the whole

subject-matter and as to *all* the causes of action involved. (Cases cited.)" (Emphasis supplied.)

The teaching of *Collins* was followed by this Court as recently as December 19, 1956, when, in Howard Terminal v United States, 9 Cir., 1956, 239 F.2d 336, 337, we said:

> "In dealing with decisions of the district courts in cases involving multiple claims or grounds or causes of action in which the court disposes of some claims and reserves action upon others, it has long been the rule that the judgment to be appealable 'should be final not only as to all the parties but as to the whole subject-matter and as to all the causes of action involved'. (Quoting *Collins* v *Miller,* supra.)"

4. *That Part of the Court's Order Dismissing Counts Three and Four, Since It, Too, Goes to the FORM and Not to the Merits Of the Basic Controversy, Is Not Appealable.*

The District Judge, as we have seen, dismissed Counts Three and Four, not on the merits, *but on the "class suit"* form to which the appellants had resorted. The Court merely said that he could find nothing in the books "which authorizes a class suit," etc.

Here again the District Judge did not close the forensic door in the faces of the seamen. In the order of November 16, 1956, in considering "the question of whether one or more seamen may sue on behalf of other seamen similarly situated," the Court, after citing numerous decisions, observed:

"These cases require that the libeling seaman have written authorization from those whom he seeks to represent. Such authorization is present in this case (as to Counts One and Two). Therefore, the four named libelants may sue on behalf of those from whom they have authority to do so, if the named libelant and those from whom he has *such written authority* sailed on the same voyage or voyages together." (Emphasis supplied.)

In their contention that this Court has jurisdiction of their appeal in so far as it relates to Counts Three and Four, the appellants rely upon 28 USCA §1292(3), which reads as follows:

"*§1292. Interlocutory decisions*

"The courts of appeal shall have jurisdiction of appeals from:

* * *

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

The "rights and liabilities" referred to in the above subsection are *substantive* in nature—not adjective, tactical, or procedural. This was recently emphasized by Judge Medina in the case of In re Wills Lines, 2 Cir., 1955, 227 F.2d 509, 510, certiorari denied, 1956, 351 U.S. 917:

"When, by amendment in 1926, certain interlocutory appeals were permitted in admiralty cases, it was not contemplated that the dockets

> of appellate courts in the federal system should be burdened with all the odds and ends of interlocutory orders, most or all of which would in any event be reviewable on an appeal by an aggrieved party from a final decree. It has been repeatedly held, in this Circuit and elsewhere, that interlocutory decrees 'determining the rights and liabilities of the parties to admiralty cases' means deciding 'the merits of the controversies between them'. (Many cases cited.)"

In All American Airways v Elderd, 2 Cir., 1954, 209 F. 2d 247, 248, 249, the Court observed that "There is perhaps something anomalous in apparent legal participation in a lawsuit by persons unnamed and unidentified as individuals who, unless they show themselves by intervening, remain legally unaffected by any action taken in the case." We share that Court's apparent disinclination to encourage such a type of action, and we most certainly agree with its concrete holding:

> "In any event the non-appealability of the order (dismissing certain counterclaims as to so-called "related [but unnamed] defendants") in this type of class action is apparent."

5. *There Is No Merit to the Appellant's Cry of "Congestion".*

We need not spend much time upon the appellants' plea that the District Court's ruling as to Counts One and Two "has required the filing of thousands of separate libels," etc., and that "this Court should consider the clogging of the admiralty docket," etc. Cer-

tainly at this stage of the proceedings, we are not called upon to rule upon objections of that kind. When the case comes to us on final appeal, we may wish to consider that phase of the matter, but not now, by what the appellee properly terms "an extraordinary interference by this Court in the District Court's discretion in fixing the details of its procedures by rulings as to form of pleadings."

The appellants ask that, if the order appealed from is considered non-appealable, "this Court should treat the appeal as a petition for writ of mandate, and hear the matter on the merits". We do not believe that the situation here presented calls for the granting of any such peremptory writ. As was said in Balboa Shipping Co. v Standard Fruit & Steamship Co., 2 Cir., 1950, 181 F.2d 109, 110:

> "It is true that if decision on the merits goes against libellant and if on appeal the district court's order with respect to the amended libel should be reversed, much time and money will have been futilely expended. But in the absence of statutory relaxation of the present rules on appealability, that practical consideration cannot alter the inevitable conclusion here."

With that view we unreservedly agree.

We also consider apposite the following observation in an article appearing in the Stanford Law Review of December, 1953:

> "The class suit is dangerous, however, for the very reason that it is useful—it deprives potential litigants of their day in court. Holding a

> 'class' of persons bound by a proceeding in which only a few need be made parties can effect sweeping economies of litigation. But it can also mean a drastic invasion of the rights of those affected, particularly where they are without notice or opportunity to intervene."[1]

6. *Conclusion*

Accordingly, since the order of February 27, 1957, from which the present appeal has been taken, was not a final judgment, the appeal is hereby Dismissed.

(Endorsed:) Opinion. Filed Oct. 29, 1957.

Paul P. O'Brien, Clerk.

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[1] "Class Actions and Interpleader: California Procedure and the Federal Rules." Volume 6, Number 1, Page 120.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 377

JOHN J. ROGERS, *et al.*,
Petitioners,

vs.

ALASKA STEAMSHIP COMPANY, *et al.*,
Respondents.

JOHN J. ROGERS,
Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Brief for Respondents in Opposition

OPINIONS BELOW

The opinions of the court of appeals in the *Alaska Steamship* case, No. 16862 below, are reported at 290 F.2d 116 and 290 F.2d 124. The opinions are printed in the appendix to the petition, pp. 4-24. The opinions affirmed a decree of the district court entered on February 16, 1960,

unreported, printed in the appendix to the petition, pp. 32-35.

The opinion of the court of appeals in the *American President Lines* case, No. 17140 below, is reported at 291 F.2d 740. It is printed in the appendix to the petition, pp. 25-31. The court of appeals there affirmed the decree of the district court entered on September 2, 1960, based on an order dated May 31, 1960, unreported, printed in the appendix to the petition, pp. 35a-35c.

These decrees and opinions involve some fourteen other orders of the district court. An abbreviated history of this litigation, printed at the beginning of the appendix to this brief, sets forth the chronology of these orders. The principal orders are printed in the appendix as indicated in such history. Consideration may also be necessary of a consent decree of the court of appeals, a certification of the National Labor Relations Board, and an earlier opinion of the court of appeals, all of which are also referred to in the abbreviated history of proceedings with references as to where they are printed.

JURISDICTION

Respondents do not attack the jurisdiction of this Court.

QUESTIONS PRESENTED

Petitioners[1] assert that four questions are presented to this Court. The first two, relating to class actions and joinder, are not here because the court of appeals properly held them to be moot.

1. The term "petitioners" when unqualified is used as embracing three groups identified as (1) the "650 petitioners", those petitioners who never were parties below, (2) Rogers, the "libelant-petitioner" who filed a timely amended pleading, and (3) the other three "libelant-petitioners" who were named as parties to the first libel but who failed to file timely amended pleadings.

The third question, involving an alleged misconstruction of orders below, is a belated attempt to raise a due process issue that is not presented by this record.

The last question, an abstract one regarding use of the common counts in a pleading, is likewise not presented by this record. The question on this subject is the following:

> Whether the mere inclusion in a seamen's libel of implied contract allegations in the form of the common counts precludes dismissal of an action on wages covered by an express contract when libelant refuses to allege any facts to avoid the binding and valid character of that contract.

STATUTES INVOLVED

The questions before this Court do not directly raise the interpretation of any statute but 28 U.S.C. § 1916 (relating to jurisdiction), 46 U.S.C. §§ 564, 565, 578, 597, 604, 644, 676 and 713 (the statutory provisions as to shipping articles), Supreme Court Admiralty Rules 23, 27, 38 and 44, and local admiralty rule 7 are of significance and are printed in the appendix to this brief.

STATEMENT

Respondents on whose behalf this brief is filed have diverse and at times conflicting interests and positions with respect to issues involved in this action. Nevertheless they are in agreement that the decisions below attacked in the petition are correct in all respects and do not call for further review in this Court. Accordingly they have consolidated their arguments in this one brief.

Petitioners are stewards department seamen employed on West Coast American flag vessels. Prior to June 19, 1952 they were represented by an exclusive agent for col

lective bargaining recognized by their employers, but a dispute developed involving several unions claiming such status. On that date the court of appeals entered a decree - consented to by the then contesting unions, the employers and the National Labor Relations Board - enforcing an order of the Board directing the employers to recognize no union as exclusive representative of stewards department employes until certification by the Board (R. 82-130; Pet. App. 36-64).[2] This decree also imposed requirements as to the wages to be paid. During the period the decree was in effect petitioners worked under shipping articles that included the wage terms required by the decree.

On June 21, 1955 the Labor Board certified the Seafarers' International Union of North America, Pacific District, including the Marine Cooks & Stewards, AFL, as exclusive bargaining representative of all unlicensed seamen on the West Coast vessels involved in the consent decree (112 N.L.R.B. 1283; App. 13). Promptly following certification the union and the employers entered into negotiations. Giving consideration to practical factors, such as the possibility of strike, the employers agreed to wage increases, retroactive wages and immediate payment of $1,000,000 into a welfare fund covering petitioners (R. III. 18). Petitioners, being dissatisfied with this certification and this bargain,[3] instituted a suit on February 8, 1956, which has now given rise to this petition.

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2. In referring to the record we shall follow the form used in the petition. References designated by "R." are to the *Alaska Steamship* transcript, No. 16862 in the court of appeals. References designated by "R. III." are to the *American President Lines* transcript, No. 17110 in the court of appeals.

In referring to appendices, references designated by "App." are to the appendix to this brief. References designated by "Pet. App." are to the appendices to the petition.

3. Petitioners claim that this certification was unlawful and that the bargain is not binding on them (R. III. 23).

Four of these dissidents filed the suit, choosing to proceed against 33 respondents in one libel stating four counts as described below. The libel claimed that additional wages were owing the employes who worked under the consent decree in order to give them the reasonable value of their services. In the first two counts, the four attempted to sue on behalf of themselves and for several hundred of the petitioners who had allegedly authorized them to sue on a "representative" basis; the last two counts purported to state class actions demanding that the 33 respondents be ordered to pay additional sums into two pension and welfare trusts (R. 1-17). It is undisputed that neither the certified union, which remains to this day the exclusive bargaining representative, nor the great body of the 4,000 cooks and stewards represented by it, nor the trustees of the welfare and pension plans, have participated in this suit in any way.

Respondents filed the ordinary exceptions to be expected in the circumstances. They insisted that each respondent as a separate employer was entitled to pleadings that related to only its employment and that were otherwise in accordance with the accepted and usual course of judicial proceedings, pointing out that the libel failed to disclose which seaman was claiming against which respondent, the voyage upon which the seaman had served, or the amount claimed, and that the class suit attempted to join a large class of libelants against many independent respondents and was not within the court's jurisdiction under 28 U.S.C. § 1916 (R. 20, 22-51, 238-245 and supporting memoranda).

These exceptions were upheld in substantial part by order entered November 16, 1956, determining that "a class suit as is attempted in the third and fourth counts" should be dismissed, that the applicable local admiralty rule precluded libelant-petitioners' heterogeneous joinder of libel-

ants, respondents and causes, but that respondents' motions to dismiss the action be denied (R. 57-61; App. 14-18). A motion for reconsideration was filed, heard, and denied (R. 62, 76-78; Pet. App. 65-67). The order of February 12, 1957, which formalized the court's decision at this stage, set forth explicit terms for further participation in this suit.[4] The principal terms, as the opinion of the court of appeals clearly sets forth, were that "only the original four libelants could file amended pleadings" (R. 605; Pet. App. 15) and that the causes of action had to be "completely severed as to the individual respondents" so that only one respondent would be named in any amended libel (R. 605; Pet. App. 16). The order also permitted any two or more of the libelants to join their claims, and any libelant to join his claim with the claims of others whom he was authorized to represent, against any one respondent with respect to one or more voyages on which they served together (R. 77-78; Pet. App. 66). Participation in this suit could be on the terms so outlined, "but not otherwise" (R. 78; Pet. App. 66).[5]

During the three years after the 1956 order, petitioners made "several attempts to persuade" the courts below not to apply the terms of the original orders to them - this they directly admit (Pet. 16-17) - and carried on other dilatory action. They moved to consolidate their claims prior to the filing of any further pleadings (R. 63-64); this was denied (R. 78). They appealed to the court of appeals (R. 79); their appeal was dismissed as being premature (R. 148-

4. It is set forth in full in the appendix hereto, 18-20.

5. These terms were "imposed" or "directed" as provided in Supreme Court Admiralty Rules 23 and 27, the terms being based on local admiralty rule 7, generously construed over respondents' objections to permit joinder as specified to facilitate the presentation of claims that libelant-petitioners sought to have adjudicated.

1-8; Pet. App. 68-78). They submitted interrogatories (R. 134-135); the court held them to be "manifestly premature and improper" (R. 160; App. 22). They filed one amended libel (R. 166-176) (stating the individual claims of Rogers against American President Lines, involved in No. 17110 below) preceded, however, by a motion for leave of the 650 petitioners and the other three libelant-petitioners to become parties or to intervene as parties (R. 163-164; App. 23-24). Their motion to become parties was denied (R. 179-180; App. 24-25). Petitioners asked that this denial be without prejudice to its later renewal; this was not granted (R. 582). They also requested an order requiring the Coast Guard to provide their proctors with a mass of employment data without cost to them (R. 579-580) and then waited 102 days after the request was approved before presenting a written order thereon (R. 195-196; App. 27; see App. iii). During these three years, petitioners sought and obtained ten extensions of time to file pleadings, consistently conditioned on compliance with the terms imposed by the original orders.

Just 17 days less than three years after the original order was entered, a further request for time was presented and heard on October 30, 1959 (R. 584-594). In view of the time that had already elapsed and petitioners' patent unwillingness to comply with orders theretofore entered in this suit, respondents opposed this request and asked that further terms be imposed on petitioners if any additional time were granted. The court agreed that further terms were appropriate. With the consent of petitioners an order was entered giving 75 additional days in which to file amended pleadings "in strict conformity to and compliance with" the original orders, specifying that no other pleading or action would be permitted and that no further time would be granted, and warning that respondents against

whom such pleadings were not filed would be dismissed from this suit.[6]

The second amended libel in personam (R. 296-528) was the only pleading filed during this 75 day period. In one libel it joined most or all of the 650 petitioners (but none of the libelant-petitioners),[7] it joined 61 respondents (23 of the original 33 respondents plus 38 new ones), and it joined as yet uncounted causes of action. Respondents filed a motion to dismiss (R. 213-214). On February 2, 1960 the district court held that this pleading was not filed in accordance with the governing orders and that the 650 petitioners, having inexcusably "delayed more than three years to file . . . in their own behalf", came too late (R. 223-224; App. 31). It accordingly entered a decree that severed the individual claims of Rogers against American President Lines and dismissed all other respondents, all other libelant-petitioners, all 650 petitioners, and all other causes (R. 226-229; App. 32-34).

The decree was affirmed (R. 597-609; Pet. App. 4-21).[8] The court of appeals held that the decree was a final adjudication on the merits as to the four libelant-petitioners (other than as to the individual claims of Rogers against American President Lines) but specified, as to the 650

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6. The order consented to was formalized and signed on December 30, 1959 and is set forth in full in the appendix, 28-30.

Time had previously been extended on: January 23, 1958, March 5, 1958, April 23, 1958, June 27, 1958, August 26, 1958, October 31, 1958, February 5, 1959, February 25, 1959, May 6, 1959, and August 31, 1959.

7. At any time after February 12, 1957, any one of the libelant-petitioners could have filed a pleading like the one Rogers filed. There has never been a claim that many pleadings meeting the terms imposed in the original orders could not have been filed in this one suit.

8. The court of appeals overruled petitioners' contention that they satisfied the applicable terms and orders. They do not ask this Court to review this holding. See Pet. 16-17, 24 and third question, Pet. 3.

petitioners who had never been parties that the decree "could not have adjudicated the merits of their claims by foreclosing future suits" (R. 607; Pet. App. 19). It also held that the class suit and joinder issues involved in the 1956 and 1957 orders were moot, pointing out that because the parties "elected to amend", they could not complain "of the order which required the amendment" (R. 608; Pet. App. 20-21). The opinion denying rehearing reiterated that petitioners had elected to amend and held that petitioners could not establish "the underlying premise upon which the class counts are based" (R. 613; Pet. App. 24).[9]

Meanwhile a decision on the merits was reached on the individual claims of Rogers. His pleading set forth in general the facts as to wages and the consent decree, specified the voyages on which he sailed, asserted that his employer had not paid him the reasonable value of his services and had been unjustly enriched as a result thereof, and demanded additional wages be paid him, including the sums previously sought for the benefit of the welfare and pension funds (R. III. 1-10).[10] Exceptions (R. III. 11-14) and exceptive allegations (R. III. 15-21) and replies thereto (R. III. 22-26) were filed and facts were admitted. In his reply to exceptive allegations, Rogers alleged he was led to believe he would be paid the full and reasonable value of his services after certification of a collective bargaining agent

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9. The court explained (in this supplementary opinion after argument in the Rogers individual case) that before anyone could show that any sums were due to the welfare and pension plans it was necessary to establish, as the first premise of such a case, that additional wages were due to the seamen so as to raise the base on which the welfare and pension contributions were computed (R. 612-613; Pet. App. 22-24).

10. See paragraphs IX and X of the individual libel filed by Rogers (R. III. 3-4) and *cf.* paragraphs VIII and IX of the second amended libel (R. 298).

and without the necessity of suit (R. III. 24).[11] On the entire record it appeared without dispute that Rogers had on each voyage been employed pursuant to the terms of written shipping articles as required by 46 U.S.C. §§ 564 and 565 (App. 1, 2) and that he had been paid in full under his express written agreements.

The district court ruled that an action on an implied contract does not lie where there is a valid express contract covering the subject matter and that the shipping articles were valid express wage contracts in the absence of any allegations avoiding them (R. III. 27-30; Pet. App. 35a-35c). Rogers was given leave to file a further amended pleading (R. III. 29-30; Pet. App. 35c), but he elected to stand on his pleading. A decree on the merits was entered (R. III. 45-46; App. 38). An appeal was taken, and the court of appeals affirmed (Pet. App. 25-31).

REASONS FOR DENYING THE WRIT

Petitioners present no substantial questions that should be reviewed by this Court. The petition purports to present questions as to whether class actions lie in admiralty, whether "representative suits" for seamen's wages may be joined under specified circumstances, whether a libel for wages may be dismissed with prejudice "for mere misconstruction of an ambiguous order" without violating the due process clause and whether wage claims by seamen can be stated in the form of the common counts. As fully appears from the opinions of the court of appeals (R. 597-609, 612-613, R. III. 55-59; Pet. App. 4-21, 22-24, 25-31) none of these

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11. Petitioners now assert, for the first time, that this expectation was based on employer assurances. There were neither allegations to this effect in the record nor even any such claim below during the years this suit has been pending.

questions is presented by the present record. The court of appeals held the first two questions as listed in the petition moot and so did not reach them (R. 608; Pet. App. 20-21). The third question, which is a belated attempt to create a due process issue based on a contention that petitioners were dismissed with prejudice "for mere misconstruction of an ambiguous order", is not presented by the record. Similarly, petitioners' abstract common counts question is not open here. The common count question presented by the record, which we have stated, is clearly not substantial; however, since it goes to the foundation of the petitioners' claims it warrants first consideration.

No substantial question is presented to this Court with respect to the use of the common counts in the libel against American President Lines.

Petitioners have incorrectly stated the question presented to this Court with respect to their use of the common counts. There was no issue below, nor is there one here, as to whether allegations in the common counts can be used to state wage claims in an admiralty court or any other court. The relevant question is whether the libel was immune to attack simply because the allegations of the basic facts were supplemented by paragraphs of common counts setting forth the theory of each cause of action. In other words the question is whether a libelant may recover the reasonable value of his services or common counts when the pleadings establish he has worked under a valid express wage contract.

The district court held that the Rogers libel did not state a cause of libel because the parties' express contract "must be set aside . . . under some theory" before the court can imply a contract for them (R. III. 29; Pet. App. 35c). It granted Rogers leave to file an amended pleading, pointing out:

> "The very least required of libelant is that he set forth the facts he relies on to avoid the ordinary meaning of the employment contract and the release. If he relies upon fraud or perhaps upon duress he must allege what facts constitute such; if he has another theory to avoid these agreements he should state it." (R. III. 29; Pet. App. 35c).

He elected to stand on his pleading. Thereupon the court entered a final, appealable decree (R. III. 35-36; App. 38). This decision on the merits was affirmed (R. III. 55-59; Pet. App. 25-31).

The lower courts have understandably refused to imply a contract where a valid and binding express contract covers the subject matter. This principle is well established. *Klebe v. United States*, 263 U.S. 188 (1923). Application of this principle in admiralty is consistent with, if not required by, the Seamen's Act, which confirms the binding nature of the articles and requires execution by employer and seaman alike of written shipping articles specifying *inter alia* all provisions as to wages.[12] The lower courts have repeatedly refused to imply contracts in place of such valid and binding express contracts for wages.[13]

There is no merit in petitioners' contention that *Labor Board v. Waterman Steamship Corp.*, 309 U.S. 206, establishes that "the articles are not, under modern conditions of collective bargaining, the meaningful contract as to wages" (Pet. 23). In that case the Labor Board held that

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12. 46 U.S.C. § 564. See also 46 U.S.C. §§ 565, 578 and 676, Third; *cf.* 46 U.S.C. §§ 597, 604, 644, 676 and 713. It is admitted that articles were signed by Rogers as required by statute for each of his voyages (R. III. 23).

13. *The Lottie Bennett*, 3 F. Supp. 764 at 766 (N.D. Cal. 1933); *The Sea Train New Orleans*, 127 F.2d 878 at 879 (5th Cir. 1942); *Montoya v. Tidewater Associated Oil Co.*, 174 F.2d 607 (2d Cir. 1949), cert. den. 338 U.S. 847.

seamen, like other employes, had "a continuing tenure or relationship" that was protected by the National Labor Relations Act and overruled a contention that seamen paid off under their articles could be denied further employment because of union affiliation without violation of the Act. This holding in no way suggests that articles no longer are express contracts as to wages. Articles do not deal with the continuing tenure protected by the Act; but they do deal with wages in detail as the statutes clearly and designedly require.[14] Accordingly they are "meaningful" as to wages.

Reliance on *Archawski v. Hanioti*, 350 U.S. 532, is equally erroneous. In that case this Court merely held that recovery could be had in admiralty on the theory of *indebitatus assumpsit* where the facts supported such a recovery. It clearly did not hold, as petitioners urge, that a pleading incorporating a common count in the allegations is immune to exceptions; in fact no pleading issue was involved in the case. Patently, the question is not whether in some hypothetical case a pleading in the common counts will stand up in admiralty, but rather whether the district court correctly dismissed the libel on the basis of all the facts properly before it after Rogers stood on his pleading. This question is not only insubstantial but has been correctly decided in accordance with well-settled legal principles. *Archawski* in no way even suggests that when the common counts are incorporated in a pleading a contract will be implied on a matter governed by an express written contract.

Petitioners' argument that decisions of this Court have been ignored by the courts below will not stand analysis.

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14. In *Waterman*, this Court stated, with respect to the statutory requirement that articles be signed for each voyage, "The design was to protect seamen from being carried to sea against their will; to prevent mistreatment as to wages and to assure against harsh application of the iron law of the sea during voyages." 309 U.S. 206 at 212.

Nor is there merit in the plaint of Rogers that he was not given leave to file an amended pleading after the lower court's decree was sustained (Pet. 18); it simply ignores the principle that appeals are allowed only from final judgments.

No substantial question for this Court is presented by petitioners' attack upon the lower courts for not deciding moot questions before dismissing the action, the parties and their causes.

Petitioners' first two questions relate to class suit and joinder questions involved in the 1957 order. The court of appeals refused to review these because they were not properly before it. Pointing to controlling facts that "the parties did not choose to let that order go to final judgment" and that "they elected to amend" (R. 608; Pet. App. 20-21) the court below held, on authority controlling in the circuit, that complaint could not be made before it with respect to the 1957 order.[15] Petitioners do not attack this holding as being contrary to the accepted and usual rule, or as being in conflict with an applicable decision of this Court or of any other circuit. No one of their questions is directed at this holding. We submit this disposes of the class suit and joinder questions here.

In any event, such questions are moot. This is unmistakably demonstrated by the principal grounds of the opinions holding that there was a proper dismissal of all the parties, both the petitioners and respondents, and of all the causes of action. Petitioners were dilatory and came too late; they

15. The court of appeals cited *Studio Carpenters Local Union v. Loew's Inc.*, 182 F.2d 168, cert. den. 340 U.S. 828, reh. den. 340 U.S. 885. This ground, contrary to statements of the petition, was clearly set forth as to both the joinder and class suit issues in the original opinion (R. 608; App. 20-21) and was amplified in the opinion denying rehearing by further statements that petitioners elected to amend (R. 612, 613; Pet. App. 22, 23-24).

failed to comply with specific terms imposed on the filing of amended pleadings; they failed to comply with the orders of the court, a crucial one being entered with consent; their time for taking any further action in this suit expired when they filed a pleading that was improper under the local and Supreme Court Admiralty Rules; on his individual claims, Rogers failed to state a cause of libel;[16] the dismissal was proper for other reasons. These grounds, in general, relate to the interpretation and application of rules and orders governing the form of pleadings and other matters peculiarly within the discretion of the trial court so that the decisions on them are subject to only the most limited review in the court of appeals. Let us turn to some of them.

The court of appeals properly sustained the exercise of discretion in dismissing all parties and all causes.

All respondents, the 650 petitioners and the libelant-petitioners (except Rogers), and all their causes were dismissed from this suit because no amended pleadings were filed in accordance with previous orders. The district court found that the terms on filing amended pleadings set forth in the original orders had not been satisfied and the court of appeals affirmed (R. 607; Pet. App. 18). These terms had been "imposed" or "directed", as provided in Supreme Court Admiralty Rules 23 and 27 (App. 11). All the petitioners repeatedly acquiesced in these terms by their many requests for extensions of time, the orders being

16. The disposition of the individual Rogers libel clearly disposes of his claims and renders moot all issues as to him. But petitioners have insisted that he has presented a "pilot case" (Pet. 11); they repeatedly stated in the courts below that they were prepared to be bound by the determination of this case on the merits because, in petitioners' minds, all their cases are alike on the merits so that if they cannot recover in one, they cannot recover in any (R. 554). Acceptance of this position even for the sake of argument, requires the conclusion that all other issues in the entire litigation are moot.

regularly conditioned on compliance with these terms. It would be unconscionable, of course, for petitioners to have obtained eleven extensions of time covering a period of many years, under a guise that they were attempting to comply with these terms, and then to have attacked these terms as arbitrary or capricious or to have attacked the power of the court to impose these conditions. In fact, petitioners directly consented to the December, 1959 order reaffirming these terms, limiting what they could do in this proceeding and setting a final time limit thereon (R. 593). Their dismissal - for failure to meet these terms within the time limit set - is a judgment pursuant to a consent order and thus, we submit, dismissal is by a decree that cannot be reviewed. In any event the court of appeals not only directly held that the second amended libel, and its supplement if open to consideration, failed to comply with the orders referred to in the December, 1959 order (R. 604-606; Pet. App. 15-17), but it went on to say, "The attempt in the second amended libel to add these 650 seamen as parties libelant was in complete disregard of this order of denial (of intervention of May 6, 1959) and constituted noncompliance therewith." (R. 606; Pet. App. 17-18). Petitioners do not here claim that they acted in compliance with these orders.[17] Dismissal was clearly a proper exercise of discretion in view of the failure to comply with the court's orders.[18]

Not only did petitioners so violate the applicable initial terms and later orders, but they exhausted their time and were found to be "too late" (R. 227; Pet. App. 33). On

17. Pet. 16-17, 24, and 3rd question, Pet. 3.

18. Supreme Court Admiralty Rule 38 provides, "If, in any admiralty suit, the libellant shall not . . . comply with the orders of the court . . . the same may be dismissed with costs."

this ground all respondents were dismissed from this suit (R. 227-228; Pet. App. 34-35). So too, libelant-petitioners (except Rogers) and all of their individual and representative cases, were dismissed for failure to "tender any claims" within the time limits (R. 227; Pet. App. 33). Similarly, the court of appeals held that the 650 petitioners were properly denied leave to participate in this suit for being "too late" (R. 607; Pet. App. 18-19). The court of appeals gave a further ground for this result in that the 650 petitioners had sought to become parties to the case by pleading their counts without seeking or obtaining leave (R. 606-607; Pet. App. 17-18).

This suit has been left an empty shell by the dismissal of the *Alaska Steamship* action and the *American President Lines* action, all of the parties libelant, all of their individual and representatives causes, and all respondents and by the holding that the 650 petitioners never became parties to the action. The court of appeals held, as petitioners admit (Pet. 17), that any questions remaining in the suit, thus stripped down to the caption and a file number, were moot. These actions being clearly proper, there are no other issues in the suit.

Petitioners' suggestions that this Court should give them further opportunity to proceed in this suit do not present a substantial question.

By their third question petitioners suggest that they will be denied due process of law unless they are given a further opportunity to proceed in view of their alleged misinterpretation or misconstruction of the terms that for years had been governing their participation in this suit.[19]

19. There is no basis for petitioners' claim of "mere misconstruction of an ambiguous order" (Pet. 3) or for excusing their "misinterpretation" (Pet. 24). Their reference to a colloquy in the district court (Pet. 24) ignores the context in which that court

The district court dismissed libelant-petitioners. No one of the three filed an amended pleading within the 75 days allowed in the eleventh extension of time, although there had been clear and formal notification that there would be no further extensions of time granted. Each could have at any time filed a pleading like that filed by Rogers. There is no claim that the earlier orders permitted them to do nothing.

The petition, however, seems primarily concerned with the situation of the 650 petitioners. The decree was sustained as to them because of noncompliance with the terms of the original orders, as to which a claim of misinterpretation or misconstruction is made, and because they were "too late". The court of appeals upheld the decree on the further ground that the attempt of the 650 petitioners to come into the suit "was in complete disregard" of the order of May 6, 1960 (R. 606; Pet. App. 17-18), an order as to which there is no claim of misconstruction or misinterpretation. And beyond this, the court of appeals did *not* permit the dismissal to operate with prejudice as to the 650 petitioners but permitted it only to preclude their "participation in the instant action" (R. 607; Pet. App. 18). There has been no lack of due process.

The courts below have not been hostile to these seamen.

While petitioners would lead this Court to believe that they were the victims of hostility on the part of every court that has heretofore dealt with them, the above analysis

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refused petitioners' request to amend its denial of intervention so as to make it without prejudice to its later renewal (R. 582). Similarly, the reference to the 1957 opinion of the court of appeals (Pet. 10-11) indicates a studied ignoring of the language from this Court's opinion in *Collins v. Miller*, 252 U.S. 364 at 370 that was twice quoted by the court of appeals (R. 148-5; Pet. App. 73, 74).

of their principal complaints demonstrates that they are completely groundless. The court of appeals has neither rendered a decision in conflict with the decision of another court of appeals on the same matter nor decided a federal question in a way that is in conflict with the applicable decisions of this Court. It has not departed from the accepted and usual course of judicial procedures, or sanctioned such a departure by a lower court. The orders below do not call for an exercise of this Court's power of supervision. The courts have simply, and uniformly and repeatedly, told petitioners that they, like other litigants, cannot proceed in court if they insist in ignoring court orders, the governing rules of court procedure and well-established substantive law.

CONCLUSION

We respectfully submit that there are no grounds for the grant of a writ of certiorari and the petition should be denied.

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Appendix

ABBREVIATED HISTORY OF PROCEEDINGS

June 19, 1952	The Court of Appeals for the Ninth Circuit entered its consent decree in No. 13386 **(Pet. App. 36-64).**
June 21, 1955	The National Labor Relations Board certified the Seafarers International Union **(App. 13).**
February 8, 1956	Libelant-petitioners filed a libel in personam.
May 1, 1956	Exceptions and exceptive allegations were filed by 13 respondents.
July 17, 1956	Libelant-petitioners filed a reply to exceptive allegations.
November 16, 1956	An order was entered holding that there was misjoinder of parties and causes in the first two counts and that the class counts should be dismissed **(App. 15-18).**
January 15, 1957	Libelant-petitioners noticed a motion for reconsideration and a request for ruling and a motion to consolidate causes of action.
February 12, 1957	A formal order was entered sustaining exceptions asserting misjoinder, dismissing the class counts, denying the motions of January 15 and granting the four libelant-petitioners a limited privilege of filing amended pleadings **(App. 18-20).**
February 27, 1957	Libelant-petitioners filed a notice of appeal.
March 1, 1957	Libelant-petitioners filed interrogatories with respect to the employment of petitioners.
April 1, 1957	The court reserved ruling on the objections to interrogatories filed by the 13 respondents until disposition of the appeal.
October 29, 1957	The appeal was dismissed as premature **(Pet. App. 68-75).**
January 23, 1958	An order was entered extending the time to replead in accordance with the order of February 12, 1957.

March 5, 1958	An order was entered extending the time to replead pursuant to the order of January 23, 1958.
April 23, 1958	An order was entered extending the time to replead pursuant to previous orders.
June 27, 1958	An order was entered extending the time to replead pursuant to previous orders.
August 26, 1958	An order was entered extending the time to replead pursuant to the order of February 12, 1957.
October 27, 1958	Libelant-petitioners noticed a motion to extend time to replead and to set a hearing on the objections to the interrogatories filed by 13 respondents.
October 31, 1958	An order was entered extending time to replead.
February 5, 1959	An order was entered sustaining objections to the interrogatories and giving libelant-petitioners 20 days to file amended pleadings **(App. 20-23)**.
February 25, 1959	An order was entered extending time to replead.
March 17, 1959	A notice of motion for leave to become parties libelant or, in the alternative, to intervene as parties libelant was filed on behalf of the 650 petitioners and three libelant-petitioners **(App. 23-24)**.
March 19, 1959	An amended seamen's libel in personam was filed by Rogers individually against American President Lines individually.
April 6, 1959	At the hearing on the motions of March 17, 1959 they were orally denied and the court declared it would enlarge time and would enter an order directing the Coast Guard to furnish information.
May 6, 1959	A formal order was entered denying petitioners' motion for leave to become parties libelant or, in the alternative, to intervene

	as parties libelant and enlarging time within which amended pleadings might be filed in conformity with the previous orders of November 16, 1956, February 12, 1957 and February 5, 1959 **(App. 24-26)**.
July 17, 1959	Pursuant to the oral ruling of April 6, 1959 an order was entered directing the Coast Guard to furnish information with respect to the employment of petitioners **(App. 27)**.
August 31, 1959	An order was entered extending the time provided in the order of May 6, 1959 for filing amended pleadings.
October 30, 1959	At the hearing on libelant-petitioners' motion for additional time petitioners consented to the entry of an order imposing additional terms and providing the final extension of time of 75 days.
December 30, 1959	A formal order was entered, approved as to form by petitioners, enlarging the time to file amended pleadings in conformity with the orders of November 16, 1956, February 12, 1957 and February 5, 1959, requiring them to be in strict conformity to and compliance with said orders, providing that no further extension of time would be granted beyond January 15, 1960 and warning that respondents against whom such pleadings were not filed would be dismissed **(App. 28-30)**.
January 14, 1960	The second amended libel in personam was filed.
January 25, 1960	Respondents filed motions to strike and dismiss the action.
January 28, 1960	A supplement to the second amended libel was filed.

February 2, 1960	An order was entered granting respondents' motion to dismiss, except as to the separate libel filed by John J. Rogers **(App. 31)**.
February 16, 1960	A final decree was entered severing the individual claims of John J. Rogers against American President Lines and dismissing as to all other causes and parties **(App. 32-34)**.
March 7, 1960	Exceptions and exceptive allegations to the libel of John J. Rogers were filed.
March 24, 1960	A reply to exceptive allegations was filed by Rogers.
May 31, 1960	An order sustaining exceptions to the amended libel was entered granting leave to amend **(App. 35-37)**.
June 30, 1960	Motion for reconsideration was filed.
July 15, 1960	An order denying motion for reconsideration was filed **(App. 37-38)**.
September 2, 1960	A final decree of dismissal was entered **(App. 38)**.
January 27, 1961	The decree of February 16, 1960 was affirmed **(Pet. App. 4-21)**.
April 4, 1961	A motion for rehearing was denied **(Pet. App. 22-24)**.
June 5, 1961	The decree of September 2, 1960 was affirmed **(Pet. App. 25-31)**.

28 U.S.C. § 1916. Seamen's Suits

In all courts of the United States, seamen may institute and prosecute suits and appeals in their own names and for their own benefit for wages or salvage or the enforcement of laws enacted for their health or safety without prepaying fees or costs or furnishing security therefor.

46 U.S.C. § 564. Shipping articles

The master of every vessel bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and the British North American posessions, or the West India Islands, or Mexico, or of any vessel of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this chapter, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars:

First. The nature and, as far as practicable, the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate.

Second. The number and description of the crew, specifying their respective employments.

Third. The time at which each seaman is to be on board, to begin work.

Fourth. The capacity in which each seaman is to serve.

Fifth. The amount of wages which each seaman is to receive.

Sixth. A scale of the provisions which are to be furnished to each seaman.

Seventh. Any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishments for misconduct, which may be sanctioned by Congress or authorized by the Commandant of the Coast Guard not contrary to or not otherwise provided for by law, which the parties agree to adopt.

Eighth. Any stipulations in reference to advance and allotment of wages, or other matters not contrary to law.

46 U.S.C. § 565. Rules for shipping articles

The following rules shall be observed with respect to agreements:

First. Every agreement, except such as are otherwise specially provided for, shall be signed by each seaman in the presence of a Coast Guard official to whom the duties of shipping commissioner have been delegated.

Second. When the crew is first engaged the agreement shall be signed in duplicate, and one part shall be retained by such Coast Guard official, and the other part shall contain a special place or form for the description and signatures of persons engaged subsequently to the first departure of the ship and shall be delivered to the master.

Third. Every agreement entered into before such Coast Guard official shall be acknowledged and certified under the hand and official seal of such Coast Guard official. The certificate of acknowledgment shall be indorsed on or annexed to the agreement; and shall be in the following form:

"State of ....., County of .....:

"On this ..... day of ....., personally appeared before me, a Coast Guard official in and for the said county, A.B., C.D., and E.F., severally known to me to be the same persons who executed the foregoing instrument, who each for himself acknowledged to me that he had read

or had heard read the same; that he was by me made acquainted with the conditions thereof, and understood the same; and that, while sober and not in a state of intoxication, he signed it freely and voluntarily, for the uses and purposes therein mentioned."

46 U.S.C. § 578. Unlawful shipments void

All shipments of seamen made contrary to the provisions of any Act of Congress shall be void; and any seaman so shipped may leave the service at any time, and shall be entitled to recover the highest rate of wages of the port from which the seaman was shipped, or the sum agreed to be given him at his shipment.

46 U.S.C. § 597. Payment at ports

Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: *Provided*, Such a demand shall not be made before the expiration of, nor oftener than once in five days nor more than once in the same harbor on the same entry. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall be then due him, as provided in section 596 of this title: *Provided further*, That notwithstanding any release signed by any seaman under section 644 of this title any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require: *And*

provided further, That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement. This section shall not apply to fishing or whaling vessels or yachts.

46 U.S.C. § 604. Libel for wages

If the master against whom such summons is issued neglects to appear, or, appearing, does not show that the wages are paid or otherwise satisfied or forfeited, and if the matter in dispute is not forthwith settled, the judge or justice or United States commissioner shall certify to the clerk of the district court that there is sufficient cause of complaint whereon to found admiralty process; and thereupon the clerk of such court shall issue process against the vessel. In all cases where the matter in demand does not exceed $100 the return day of the monition or citation shall be the first day of a stated or special session of court next succeeding the third day after the service of the monition or citation, and on the return of process in open court, duly served, either party may proceed therein to proofs and hearing without other notice, and final judgment shall be given according to the usual course of admiralty courts in such cases. In such suits all the seamen having cause of complaint of the like kind against the same vessel may be joined as complainants, and it shall be incumbent on the master to produce the contract and log book, if required to ascertain any matter in dispute; otherwise the complainants shall be permitted to state the contents thereof, and the burden of proof of the contrary shall be on the master. But nothing herein contained shall prevent any seaman from maintaining any action at common law for the recovery of his wages, or having immediate process out of any court having admiralty jurisdiction wherever any vessel

may be found, in case she shall have left the port of delivery where her voyage ended before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the day when such wages are due, in accordance with section 596 of this title. This section shall not apply to fishing or whaling vessels or yachts.

46 U.S.C. § 644. Rules for settlement

The following rules shall be observed with respect to the settlement of wages:

First. Upon the completion before a Coast Guard official to whom the duties of shipping commissioner have been delegated, of any discharge and settlement, the master or owner and each seaman, respectively, in the presence of such Coast Guard official, shall sign a mutual release of all claims for wages in respect of the past voyage or engagement, and such Coast Guard official shall also sign and attest it, and shall retain it in a book to be kept for that purpose, provided both the master and seamen assent to such settlement, or the settlement has been adjusted by such Coast Guard official.

Second. Such release, so signed and attested, shall operate as a mutual discharge and settlement of all demands for wages between the parties thereto, on account of wages, in respect of the past voyage or engagement.

Third. A copy of such release, certified under the hand and seal of such Coast Guard official to be a true copy, shall be given by him to any party thereto requiring the same, and such copy shall be receivable in evidence upon any future question touching such claims, and shall have all the effect of the original of which it purports to be a copy.

Fourth. In cases in which discharge and settlement before a Coast Guard official to whom the duties of shipping commissioner have been delegated are required, no pay

ment, receipt, settlement, or discharge otherwise made shall operate as evidence of the release or satisfaction of any claim.

Fifth. Upon payment being made by a master before a Coast Guard official to whom the duties of shipping commissioner have been delegated, such official shall, if required, sign and give to such master a statement of the whole amount so paid; and such statement shall, between the master and his employer, be received as evidence that he has made the payments therein mentioned.

46 U.S.C. § 676. Rules as to list of crew

The following rules shall be observed with reference to vessels bound on any foreign voyage:

First. The duplicate list of the ship's company required to be made out by the master and delivered to the collector of the customs, under section 674 of this title, shall be a fair copy in one uniform handwriting without erasure or interlineations.

Second. It shall be the duty of the owners of every such vessel to obtain from the collector of the customs of the district from which the clearance is made, a true and certified copy of the shipping articles containing the names of the crew, which shall be written in a uniform hand, without erasures or interlineations.

Third. These documents, which shall be deemed to contain all the conditions of contract with the crew as to their service, pay, voyage, and all other things, shall be produced by the master, and laid before any consul of the United States, whenever he may deem their contents necessary to enable him to discharge the duties imposed upon him by law toward any mariner applying to him for his aid or assistance.

Fourth. All interlineations, erasures, or writing in a hand different from that in which such duplicates were originally made, shall be deemed fraudulent alterations, working no change in such papers, unless satisfactorily explained in a manner consistent with innocent purposes and the provisions of law which guard the rights of mariners.

Fifth. If any master of a vessel shall proceed on a foreign voyage without the documents required, or refuse to produce them when required, or to perform the duties imposed by this section, or shall violate the provisions thereof, he shall be liable to each and every individual injured thereby in damages, to be recovered in any court of the United States in the district where such delinquent may reside or be found, and in addition thereto be punishable by a fine of $100 for each offense.

Sixth. It shall be the duty of the boarding officer to report all violations of this section to the collector of the port where any vessel may arrive, and the collector shall report the same to the Commandant of the Coast Guard and to the United States attorney in his district.

46 U.S.C. § 713. Definitions, schedule, and tables

* * * * * * *

TABLE A

FORM OF ARTICLES OF AGREEMENT

United States of America.

(Date and place of first signature of agreement, including name of shipping office):

It is agreed between the master and seamen or mariners of the _____, of which _____ is at present master, or whoever shall go for master, now bound from the port of _____, to _____, _____, (here the voyage is to be described, and the

places named at which the vessel is to touch, or if that cannot be done, the general nature and probable length of the voyage is to be stated.)

And the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said master, or of any person who shall lawfully succeed him, and of their superior officers in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, or on shore; and in consideration of which service, to be duly performed, the said master hereby agrees to pay the said crew, as wages, the sums against their names respectively expressed, and to supply them with provisions according to the annexed scale. And it is hereby agreed that any embezzlement, or willful or negligent destruction of any part of the vessel's cargo or stores, shall be made good to the owner out of the wages of the person guilty of the same; and if any person enters himself as qualified for a duty which he proves himself incompetent to perform, his wages shall be reduced in proportion to his incompetency. And it is also agreed that if any member of the crew considers himself to be aggrieved by any breach of the agreement or otherwise, he shall represent the same to the master or officer in charge of the vessel, in a quiet and orderly manner, who shall thereupon take such steps as the case may require. And it is also agreed that (here any other stipulations may be inserted to which the parties agree, and which are not contrary to law).

In witness whereof the said parties have subscribed their names hereto, on the days against their respective signatures mentioned.

Signed by ...., master, on the .... day of ....., nineteen hundred and .....

Signature of crew	Birthplace	Age	Height		Description		Wages per month	Wages per run	Advance wages	Amount of monthly allotment	Time of service		Hospital money	Wages taken	Wages due	Place and time of entry	Time at which he is to be on board	In what capacity	Coast Guard Officer's signature or initials	Allotment payable to—	Conduct qualifications
			Feet	Inches	Complexion	Hair					Months	Days									
....	....	....	....		....		....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
....	....	....	....		....		....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
....	....	....	....		....		....	....	....	....	....	....	....	....	....	....	....	....	....	....	....

NOTE.—In the place for signatures and descriptions of men engaged after the first departure of the ship, the entries are to be made as above, except that the signatures of the consul or vice consul, officer of customs, or witness before whom the man is engaged, is to be substituted for that of the shipping master.

ACCOUNT OF APPRENTICES ON BOARD

Christian and surname of apprentice in full	Date of registry of indenture	Port at which indenture was registered	Date of register of assignment	Port at which assignment was registered
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....

SCALE OF PROVISIONS TO BE ALLOWED AND SERVED OUT TO THE CREW DURING THE VOYAGE

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Water ..... quarts	5	5	5	5	5	5	5
Biscuit ..... pound	½	½	½	½	½	½	½
Beef, salt ..... pounds	.....	.....	1½	.....	1½	.....	1½
Pork, salt ..... pound	.....	1	.....	1	.....	1	.....
Flour ..... pound	½	.....	½	.....	½	.....	.....
Canned meat ..... pound	1	.....	.....	1	.....	.....	.....
Fresh bread ..... pounds	1½ pounds daily						
Fish, dry, preserved, or fresh pound	.....	.....	.....	.....	.....	1	.....
Potatoes or yams ..... pound	1	1	1	1	1	1	1
Canned tomatoes ..... pound	½	.....	.....	.....	.....	½	.....
Peas ..... pint	.....	.....	½	.....	.....	½	.....
Beans ..... pint	.....	½	.....	½	.....	.....	.....
Rice ..... pint	.....	½	.....	.....	.....	.....	½
Coffee (green berry) ..... ounce	1½	1½	1½	1½	1½	1½	1½
Tea ..... ounce	½	½	½	½	½	½	½
Sugar ..... ounces	3	3	3	3	3	3	3
Molasses ..... pint	½	.....	½	.....	½	.....	.....
Dried fruit ..... ounces	3	.....	3	.....	3	.....	.....
Pickles ..... pint	.....	½	.....	½	.....	½	.....
Vinegar ..... pint	.....	.....	½	.....	.....	.....	½
Corn meal ..... ounces	4	.....	.....	.....	4	.....	.....
Onions ..... ounces	4	.....	.....	.....	4	.....	4
Lard ..... ounce	1	1	1	1	1	1	1
Butter ..... ounce	2	2	2	2	2	2	2
Mustard, pepper, and salt sufficient for seasoning.							

SUBSTITUTES

One pound of flour daily may be substituted for the daily ration of biscuit or fresh bread; two ounces of desiccated vegetables for one pound of potatoes or yams; six ounces of hominy, oatmeal, or cracked wheat, or two ounces of tapioca, for six ounces of rice; six ounces of canned vegetables for one-half pound of canned tomatoes; one-eighth of an ounce of tea for three-fourths of an ounce of coffee; three-fourths of an ounce of coffee for one-eighth of an ounce of tea; six ounces of canned fruit for three ounces of dried fruit; one-half ounce of lime juice for the daily ration of vinegar; four ounces of oatmeal or cracked wheat for one-half pint of corn meal; two ounces of pickled onions for four ounces of fresh onions.

When the vessel is in port and it is possible to obtain the same, one and one-half pounds of fresh meat shall be substituted for the daily rations of salt and canned meat; one-half pound of green cabbage for one ration of canned tomatoes; one-half pound of fresh fruit for one ration of dried fruit. Fresh fruit and vegetables shall be served while in port if obtainable. The seamen shall have the opportunity of accepting the fare the master may provide, but the right at any time to demand the foregoing scale of provisions.

The foregoing scale of provisions shall be inserted in every article of agreement, and shall not be reduced by any contract, except as above, and a copy of the same shall be posted in a conspicuous place in the galley and in the forecastle of each vessel.

The three preceding paragraphs and the scale of provisions shall not apply to fishing or whaling vessels or yachts.

* * * * * * *

RULES OF PRACTICE IN ADMIRALTY AND MARITIME CASES PROMULGATED BY THE SUPREME COURT OF THE UNITED STATES

Rule 23. Amendments to Libels

In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made, on motion, at any time before the final decree, on such terms as the court shall impose. And where any defect of form is set down by the respondent or claimant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms on the libellant.

Rule 27. Pleadings—Interrogatories—Exceptions to

Either party may except to the sufficiency, fullness, distinctness, relevancy or competency of any of the pleadings or interrogatories filed by the other party; and if the court shall so adjudge on a hearing on the exceptions, and shall order further pleadings or answers to be filed by either party, such pleadings or answers shall be filed within such time and on such terms as the court may direct.

Rule 38. Dismissal for Failure to Prosecute

If, in any admiralty suit, the libellant shall not appear and prosecute his suit, and comply with the orders of the court, he shall be deemed in default and contumacy; and the court may, on the application of the respondent or claimant, pronounce the suit to be deserted, and the same may be dismissed with costs.

Rule 44. Right of Trial Courts to Make Rules of Practice

In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate

their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules.

LOCAL ADMIRALTY RULES, DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF CALIFORNIA

Rule 7. Joinder and Intervention

(a) Parties may sue and parties, including a res, may be sued either jointly, severally or alternately in one suit, and persons having separate causes of action may join in one suit if the causes of action involve substantially the same questions and arise out of the same transaction.

(b) Persons who, under paragraph (a), might have joined as co-libelants, persons entitled to participate in the recovery, and, in suits for wages, any other seamen claiming wages for the same voyage, not made parties in the original libel, may be admitted, upon petition, to prosecute as co-libelants upon such terms as the Court may deem reasonable.

United States of America
Before the National Labor Relations Board

Cases Nos. 20-RC-2651 and 20-RC-2675

PACIFIC MARITIME ASSOCIATION, et al.,
Employers,
and
SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, PACIFIC DISTRICT, et al.,
Petitioners.

CERTIFICATION OF REPRESENTATIVES

IT IS HEREBY CERTIFIED that Seafarers International Union of North America, Pacific District, Comprising Marine Firemen's Union, Sailors Union of the Pacific and Marine Cooks & Stewards, AFL, has been designated and selected by a majority of the employees on vessels operated by the Pacific Maritime Association and Its Member Companies, a nonprofit California Corporation, in the unit heretofore found appropriate, as their representative for the purposes of collective bargaining and that, pursuant to Section 9 (a) of the Act, the said organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Dated, Washington, D. C. June 21, 1955

In the United States District Court for the Northern District of California, Southern Division

In Admiralty—No. 27278

JOHN J. ROGERS, et al.,
Libelants,

vs.

ALASKA STEAMSHIP COMPANY, et al.,
Respondents.

ORDER

This is an action in admiralty instituted by four seamen for wages allegedly due them for services which they performed for the respondent shipowners while serving as stewards aboard the latters' ships. The libelants take advantage of 28 U.S.C. 1916 which permits them to proceed without the prepayment of costs. The libelants allege that one or more of them participated in voyages for one or more of the respondents during the period from June, 1952 to October, 1955 and that, although they received some compensation for such services, the wages paid them did not represent the reasonable value of their services.

For services so performed the libelants seek compensation in two forms. In the first count, the libelants, suing on their own behalf and on behalf of approximately four hundred other seamen from whom they have written authority to sue but who are not made parties to the libel, seek to be paid the reasonable value of their services, less payments already made to them and to welfare and pension funds established for their benefit. In the third count, the libelants, on behalf of themselves and approximately four thousand [R. 57] other unnamed seamen, ask that the reasonable

value of the services of all, less amounts already paid to each of them and to their welfare and pension funds, be paid directly into such funds.

The second and fourth counts are framed along the same lines as the first and third counts, respectively, adding allegations that the respondents will be unjustly enriched by failure to make the payment demanded.

Exceptions filed by the respondents raise procedural defects in the libel. We will first consider the exceptions pertinent to the first and second counts, namely, those directed to the misjoinder of the four named libelants, the respondents and the causes of action and the propriety of the four named libelants representing some four hundred other seamen.

Rule 7(a) of the Admiralty Rules of this District provide:

> "Parties may sue and parties, including a res, may be sued either jointly, severally or alternately in one suit, and persons having separate causes of action may join in one suit if the causes of action involve substantially the same questions and arise out of the same transaction."

The requirement that the cause of action arise out of the same transaction controls the disposition of the exceptions directed to the misjoinder. The claim for wages is based on voyages, each voyage constituting a separate cause of action for each seaman. But each [R. 58] voyage is a separate transaction between a seaman and the shipowner. Therefore, the causes of action which the libelants allege do not arise out of the same transaction. This precludes the joinder of the respondents and likewise precludes the joinder of the four named seamen. It necessarily follows that if the parties cannot be joined, the causes of

action cannot be joined. The exception to the joinder of the four named libelants and the respondents and the joinder of the causes of action should be sustained.

We next consider the question of whether one or more seamen may sue on behalf of other seamen similarly situated. Rule 7(a) is not applicable to this question, as it is concerned with the joinder of parties and does not govern the propriety of representative suits in admiralty. There are no other admiralty rules, either of this Court or of the Supreme Court, which allow one seaman to represent another in a suit for wages. However, there are cases which either specifically allowed such procedure (*The Roosevelt*, D.C., 1938, 23 F.Supp. 620, modified in 94 F.Supp. 698) or recognized that such procedure would be possible under proper circumstances (*The Nico*, D.C., 1951 A.M.C. 1190; and *Totolos, et al. v. Compania De Navegacion Cristobal*, D.C., 1950, 94 F.Supp. 699). These cases required that the libeling seaman have written authorization from those whom he seeks to represent. Such authorization is present in this case. Therefore, the [R. 59] four named libelants may sue on behalf of those from whom they have authority to do so, if the named libelant and those from whom he has such written authority sailed on the same voyage or voyages together.

There are no admiralty rules governing the effect of misjoinder of parties and the respondents urge that the action be dismissed. Supreme Court Admiralty Rule 44 provides:

> "In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."

We are influenced by Federal Rule of Civil Procedure 21 in determining what is expedient "for the due administration of justice." Rule 21 provides:

> "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

Therefore, as to the causes of action alleged in the first two counts, the motion to dismiss should be denied. The causes of action of each of the four named libelants shall be completely severed, both as among themselves and as to each of the respondents against whom they have a claim, with the exception that any two or more of the four named libelants may join their claims against one respondent if they served together on the same voyage or voyages. Any one of the four named libelants may sue on behalf of any one of the four hundred whom they seek to represent if those represented seamen served on the [R. 60] same voyage or voyages with them.

We have been shown no authority which authorizes a class suit as is attempted in the third and fourth counts of this libel. Indeed, the language of the *Nico* and *Tatobas* cases, supra, and the modified order in *The Roosevelt*, supra, negate any such procedure. The exception to the class action should be sustained and the motion to dismiss should be granted as to the third and fourth counts.

Inasmuch as the foregoing requires a severance of the causes in the first two counts and a dismissal of the third and fourth counts, no ruling on the exceptive allegations concerning the shipping articles and releases is made. Nor, for the same reason, is any ruling made on the exception which raises the question of laches.

The respondents are to prepare an order in accordance with the above.

Dated: November 16, 1956.

s/ O. D. HAMLIN
United States District Judge

[Endorsed]: Filed Nov. 16, 1956. Clerk, U.S. Dist. Court, San Francisco [R. 61]

[Title of Court and Cause.]

ORDER

Exceptions and exceptive allegations having been filed to the libel in the above-entitled cause by various respondents and having regularly come on for hearing on the 8th day of May, 1956, libelants being represented by Allan Brotsky, Esq., respondent American President Lines, Ltd. being represented by Peter N. Teige, Esq., respondents Matson Navigation Company, The Oceanic Steamship Company and Oliver J. Olson & Co. being represented by Messrs. Brobeck, Phleger & Harrison by Alvin J. Rockwell, Esq., respondent Coastwise Line being represented by Richard Ernst, Esq., respondent Grace Line, Inc. being represented by Messrs. Wallace, Garrison, Norton and Ray by William R. Ray, Esq., and respondents American Mail Line, Pacific Transport Lines, Inc., States Steamship Company, Pacific-Atlantic Steamship Co., Pacific Far East Line, Pope & Talbot, Inc. and Pacific Argentine Brazil Line being represented by Messrs. Lillick, Geary, Wheat, Adams & Charles by Gary J. Torre, Esq., and the respective proctors having been heard in support of and in opposition to said exceptions and exceptive allegations, and the matter having been briefed and duly submitted for deci-

sion, and the court having filed on the 16th day of November, 1956 an order sustaining certain of said respondents' exceptions to the libel herein, reserving ruling on the exception which raises the question of laches and on the excepitve allegations concerning the shipping articles [R. 76] and releases, and directing that a further order be prepared and libelants having thereafter filed a motion to consolidate libelants' causes of action and a motion for reconsideration and request for ruling together with affidavits in reference thereto and the motions having been presented in open court and argued by libelants and respondents on the 7th day of February, 1957 and the Court having reconsidered the entire matter and good cause appearing therefor:

It is hereby ordered that Counts Three and Four of the libel herein be, and the same hereby are, dismissed; and

It is further ordered that the exceptions of said respondents, with respect to Counts One and Two of the libel herein to the misjoinder of libelants, respondents and causes of action, be and the same are hereby sustained; that the libelants shall have sixty (60) days to file amended pleadings in which the causes of action of each of the four named libelants shall be completely severed, both as among themselves and as to each of the respondents against whom they have a claim, with the exception that any two or more of the four named libelants may join their claims against one respondent with respect to one or more voyages on which they served together and any one of the four named libelants may sue with respect to one or more voyages on behalf of himself and those with whom said libelant sailed on the same voyage or voyages and whom [R. 77] said libelant has written authority to represent in this action, but not otherwise; and

It is further ordered that libelants' motion to consolidate libelants' causes of action and libelants' request for ruling may be, and the same hereby are, denied.

Dated: February 12, 1957.

s O. D. HAMLIN
United States District Judge

[Endorsed]: Filed Feb. 12, 1957. C. W. Calbreath, Clerk.
[R. 78]

[Title of Court and Cause.]

ORDER SUSTAINING OBJECTIONS TO INTERROGATORIES.

On February 8, 1956 the four named libelants filed a four-count libel against the thirty-three respondent steamship companies. Counts one and two respectively sought recovery for the reasonable value of services rendered to respondents and for unjust enrichment, on behalf of the four named libelants and some 600 other seamen who had purportedly authorized the four named libelants to sue. Counts three and four were class counts by the four named libelants seeking similar recovery on behalf of themselves and approximately 4000 unnamed seamen.

On February 12, 1957, Judge Hamlin entered an order dismissing counts three and four and sustaining exceptions to counts one and two on the ground of misjoinder of parties and causes of action. The order granted leave to file amended pleadings in which the causes of action of each of the four [R. 158] named libelants should be severed, both as among themselves and as to each of the respondents, with the exception that any two or more of the four named libelants might join their claims against one respondent with respect to one or more voyages on which they served

together and any one of the four named libelants might sue with respect to one or more voyages on behalf of himself and those with whom said libelant sailed on the same voyage or voyages and whom said libelant had written authority to represent in this action.

On February 27, 1957, libelants filed a notice of appeal from Judge Hamlin's order. Simultaneously they filed and served interrogatories directed to each of the thirty three respondent steamship companies as follows:

1. State whether, as to each libelant herein and each person named in Exhibit A to the libel herein, as supplemented through October 25, 1956 (some 600 seamen) such person was employed in the stewards department of any vessel owned, chartered, managed, operated, navigated or controlled by you during the period from June 19, 1952 through October 15, 1955.
2. If, as to any such person, the answer to the preceding interrogatory is in the affirmative, state as to each such person
   (a) the name of the vessel on which employed,
   (b) the voyage number or numbers during which employed,
   (c) the period or periods during which employed for each voyage number or numbers, and
   (d) the job classification in the stewards department for which employed for each such voyage.

Respondents objected to these interrogatories, and on April 1, 1957, Judge Murphy reserved ruling on the objections until libelants' appeal was disposed of.

On October 29, 1957, the Court of Appeals dismissed libelants' appeal on the ground that the order of Judge Hamlin from which the appeal was taken was not a final order. 249 F.2d 646. [R. 159] Thereafter libelants' time to

replead was extended from time to time until on November 17, 1958 it was extended until a reasonable time after the Court should hear and dispose of respondents' objections to the interrogatories which libelants had filed at the time of taking the appeal.

The Court has now heard respondents' objections to the interrogatories and written memoranda have been filed. Respondents' principal objection is that the interrogatories are premature inasmuch as there is now no libel on file in which any specific claim is asserted against any of the respondents. Libelants assert that they are unable to file amended pleadings in accordance with Judge Hamlin's order until they have the information sought by the interrogatories and that such interrogatories afford the only practical means of obtaining the information.

The mere statement of the circumstances under which the interrogatories were filed demonstrates that they are manifestly premature and improper. They are not legitimatized merely by the fact that answers by respondents would obviate any difficulty libelants may encounter in obtaining the information necessary to file amended pleadings. Moreover, it appears that the necessary information is readily available to each of the seamen in behalf of whom the original libel was filed. It is conceded that each seaman may at his own request obtain from the Coast Guard a list of the voyages on which he has sailed in the employ of any of the respondents.

The only substantial burden involved in the preparation of the amended pleadings is that which the proctors, who filed the original libel, may face in contacting the seamen on whose behalf they acted. Those seamen to whom this litigation is of any real importance should have maintained contact with their proctors.

Proctors have suggested that it will take an inordinate amount of time to contact the some 600 seamen who have claims [R. 160] against respondents. But, this in itself is not a ground on which respondents can be required to answer the interrogatories. Even if it were an equitable consideration in determining the propriety of the interrogatories, there has been no showing that proctors have made any effort to contact their clients in the many months that have elapsed since the appeal was dismissed on October 29, 1957.

Respondents' objections to libelants' interrogatories are sustained. The time for filing amended pleadings by libelants is extended for twenty days from the date of this order subject to modification upon a showing of good cause.

Dated: February 5, 1959.

LOUIS E. GOODMAN
Chief Judge

[Endorsed]: Filed Feb. 5, 1959. C. W. Calbreath, Clerk. [R. 161]

[Title of Court and Cause.]

MOTION FOR LEAVE TO BECOME PARTIES LIBELANT OR, IN THE ALTERNATIVE, TO INTERVENE AS PARTIES LIBELANT

The seamen named in Exhibit A attached to the original libel on file herein, as well as those named in subsequent supplements to said Exhibit A filed April 16, 1956, and October 24, 1956, move for leave to become parties libelant or, in the alternative, to intervene as parties libelant in this action, in order to assert their several claims against the appropriate parties respondent herein, with respect to the claim or claims each such seaman has for the reasonable

value of his services on the respective voyage or voyages aboard vessels of the respective respondents during the period embraced within the original libel.

Said motion will be made and based on the records and [R. 163] files of the within action.

Dated: March 16, 1959.

s *Allan Brotsky*
s *Rubin Tepper*
McMurray, Walker & Tepper
Proctors for Libelants

[R. 164]

[Title of Court and Cause.]

ORDER

Proctors for libelants having filed a motion, on behalf of the persons named on Exhibit A attached to the libel filed on February 8, 1956 and supplements to such schedule, for leave to become parties libelant and a motion to grant libelants other than John J. Rogers an extension of time to replead; and such motions having regularly come on for hearing on the 6th day of April, 1959, libelants and movants being represented by Allan Brotsky, Esq. and Rubin Tepper, Esq. and respondent American President Lines, Ltd. being represented by proctors Peter N. Teige, Esq. and George D. Wick, Jr., Esq. and respondents Matson Navigation Company, The Oceanic Steamship Company, and Oliver J. Olson & Company being represented by proctors Messrs. Brobeck, Phleger & Harrison, by Alvin J. Rockwell, Jr., Esq. and John M. Naff, Jr., Esq. and respondent Coastwise Line and certain other respondents being represented by proctor Richard Ernst, Esq. and respondent Grace Line, Inc. being represented by proctors [R. 179] William R. Wallace, Esq., William R. Ray, Esq. and May-

nard Garrison, Esq. and respondents American Mail Line, Pacific Far East Lines, Pacific Atlantic Steamship Co., Pacific Transport Lines, States Steamship Co., Pacific Argentine Brazil Lines and Pope & Talbot, Inc., being represented by proctors Messrs. Lillick, Geary, Wheat, Adams & Charles, by James L. Adams, Esq. and Gary J. Torre, Esq., and the matter having been duly submitted for decision and the Court having considered the entire matter including the previous orders of this Court dated November 16, 1956, February 12, 1957 and February 5, 1959, and good cause appearing therefor,

It Is Hereby Ordered that the motion for leave to become parties libelant, or, in the alternative, to intervene as parties libelant, is denied as to both alternatives;

It Is Further Ordered that the time for filing amendments by libelants, except libelant John J. Rogers, is extended to and including September 1, 1959, within which enlarged time amended pleadings may be filed in conformity with the said orders of November 16, 1956, February 12, 1957 and February 5, 1959.

This order shall not in any way modify or change any of the said three orders, except to enlarge the time for libelants other than John J. Rogers to file amended pleadings. The rights of libelants to file amended pleadings within the time herein specified and to obtain a pre-trial conference at an appropriate time are preserved in full, without prejudice thereto or mitigation thereof by this order, and all defenses of the respondents with respect to the subject matter hereof are preserved in full, without prejudice thereto or mitigation thereof by this order.

s/ GEORGE B. HARRIS
United States District Judge [R. 180]

May 6, 1959

Approved as to Form:

s *McMurray, Walker & Tepper*
s *Rubin Tepper*
Proctors for Libelants
s *Peter N. Teige*
s *George D. Wick, Jr.*
Proctors for American President Lines, Ltd.
s *Brobeck, Phleger & Harrison*
by *V.W.J.*
Proctors for Matson Navigation Company, The Oceanic Steamship Company, and Oliver J. Olson & Co.
s *Richard Ernst*
Proctor for Coastwise Line
s *Wallace, Garrison, Norton & Ray*
s *William R. Ray*
Proctors for Grace Line, Inc.
s *Lillick, Geary, Wheat, Adams & Charles*
s *James L. Adams*
Proctors for American Mail Line,
Pacific Transport Lines, Inc.
States Steamship Company
Pacific-Atlantic Steamship Co.
Pacific Far East Line
Pope & Talbot, Inc.
Pacific Argentine Brazil Line

[Endorsed]: Filed May 6, 1959. C. W. Calbreath, Clerk.

[R. 180-a]

[Title of Court and Cause.]

ORDER

Proctors for Libelants having filed the affidavit of Allan Brotsky, Esq., on behalf of libelants and the persons named on the schedule marked Exhibit A to the libel filed on February 8, 1956, and supplements to such schedule, and proctors for the respective respondents having indicated no objection thereto and to the issuance of the following order, and good cause appearing therefor,

It Is Hereby Ordered that the San Francisco office, Merchant Vessel Personnel Division, United States Coast Guard, furnish without prepayment of costs and fees in accordance with the provisions of Title 28 USCA § 1916, to Allan Brotsky, Esq., and Rubin Tepper, Esq., as proctors for libelants and the persons named on said schedule, the following information from the shipping records of each of the persons whose names appear on Exhibit A to the aforesaid affidavit, a copy of which exhibit is attached hereto and made a part hereof as if fully set forth at this point: [R. 195]

During the period from June 19, 1952, through October 15, 1955,

(a) The name of each vessel on which employed, and the name of the employer;

(b) The number or numbers for which employed;

(c) The period or periods during which employed for each such voyage; and

(d) The job classification for which employed for each such voyage.

Dated: July 17, 1959

s GEORGE B. HARRIS
United States District Judge

[Endorsed]: Filed Jul. 17, 1959. C. W. Calbreath, Clerk. [R. 196]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO PLEAD

Proctors for libelants having moved for a further enlargement of the time granted by this Court's order of May 6, 1959 for libelants other than John J. Rogers to file amended pleadings, and such motion having come on for hearing on the 30th day of October, 1959, libelants being represented by Messrs. McMurray, Walker & Tepper by Rubin Tepper, Esq. and respondents Matson Navigation Company, The Oceanic Steamship Company and Oliver J. Olson & Co. being represented by Messrs. Brobeck, Phleger & Harrison by John M. Naff, Jr., Esq., and respondent Grace Line, Inc. being represented by Messrs. Wallace, Garrison, Norton and Ray by William R. Ray, Esq., and respondents American Mail Line, Pacific Argentine Brazil Line, Pacific-Atlantic Steamship Co., Pacific Far East Line, Pacific Transport Lines, Inc., Pope & Talbot, Inc. and States Steamship Company being represented by Messrs. Lillick, Geary, Wheat, Adams & Charles by Gary J. Torre, Esq., and respondent [R. 210] Coastwise Line and certain other respondents being represented by Richard Ernst, and the Court having considered the entire matter, including the previous orders of this Court dated November 16, 1956, February 12, 1957, February 5, 1959, May 6, 1959, July 17, 1959, and August 31, 1959, and it having appeared to the Court that further time to file amended pleadings in conformity with the orders of this Court of November 16, 1956, February 12, 1957 and February 5, 1959 should be granted but not beyond the 15th day of January, 1960, and that additional motions by libelants should not be permitted until any and all such amended pleadings have been filed within the time herein allowed,

It is hereby ordered that the time for filing amended pleadings by libelants, except libelant John J. Rogers, is extended to and including January 15, 1960, within which enlarged time amended pleadings may be filed in conformity with said orders of November 16, 1956, February 12, 1957, and February 5, 1959; and

It is further ordered that this order shall not in any way modify or change any of the said three orders, except to enlarge the time for libelants other than John J. Rogers to file amended pleading ; that no other action unless strictly within the contemplation of the three said orders shall be taken by libelants during the time for which time is extended; and that all defenses of the respondents with respect to the subject matter hereof are preserved in full, without prejudice thereto or mitigation thereof by this order; and

It is further ordered that only such amended pleadings as are in strict conformity to and compliance with the said orders of this Court dated November 16, 1956, February 12, 1957, and February 5, 1959 and this order and as are served and filed on or before January 15, 1960 shall be permitted in connection with the subject matter of this action; that, upon motion of this Court or upon exparte motion of counsel dismissals shall be granted as to any [R. 211] and all respondents against whom amended pleadings of the type permitted hereby are not filed during the period ending January 15, 1960; that such motions may be restricted to grounds of failure to comply with the terms of this order or of said previous orders without constituting a waiver of any other defenses or contentions; and that no extension of the time herein specified shall be granted.

Dated: December 30, 1959.

s LOUIS GOODMAN
Judge of the United States District Court

Approved as to form:

s *Rabin Tepper*
Proctors for Libelants

/s/ *Peter N. Teige*
s *George D. Wick, Jr.*
Proctor for American President Lines, Ltd.

s *Alvin J. Rockwell*
s *John M. Naff*
s *Brobeck, Phleger & Harrison*
Proctors for Matson Navigation Company,
The Oceanic Steamship Company,
and Oliver J. Olson & Co.

s *Richard Ernst*
Proctor for Coastwise Line

s/ *William R. Ray*
Proctors for Grace Line, Inc.

/s/ *Lillick, Geary, Wheat, Adams & Charles*
/s/ *James L. Adams*
Proctors for American Mail Line, Pacific
Transport Lines, Inc., States Steamship
Company, Pacific-Atlantic Steamship Co.,
Pacific Far East Line, Pope & Talbot, Inc.,
Pacific Argentine Brazil Line

[Endorsed]: Filed Dec. 30, 1959. C. W. Calbreath, Clerk.
[R. 212]

[Title of Court and Cause.]

ORDER GRANTING MOTION TO DISMISS

The Second Amended Libel filed on January 14, 1960 does not tender any claims by the original four libelants either in their own behalf or in a representative capacity in behalf of other seamen in the manner prescribed by previous orders of this Court. For the first time, four years after the commencement of this action, the amended libel names as libelants some 600 seamen whom the four original libelants had previously sought to represent and names as respondents many shipping companies not heretofore named.

Thus the Second Amended Libel not only improperly joins causes of action arising out of unrelated contracts of employment, but also comes too late. All of the information required to present the claims of the 600 seamen as they are now presented has been available in the records of the Coast Guard since the commencement of this action. Since the order of this Court entered on November 16, 1956, the presently named libelants have been apprised of the limitations inherent [R. 223] in the presentation of their claims in a representative suit. Yet, they have delayed more than three years to file the amended libel in their own behalf.

Respondents' motion to dismiss this action is granted, except as to the separate libel filed on March 19, 1959 by John J. Rogers against the American President Lines.

Dated: February 2nd, 1960.

/s/ LOUIS E. GOODMAN
United States District Judge

[Endorsed]: Filed Feb. 2, 1960. C. W. Calbreath, Clerk.

[R. 224]

[Title of Court and Cause.]

FINAL DECREE OF DISMISSAL

This action having duly come on to be heard in its regular order on the 1st day of February, 1960 upon motion that the action be dismissed, the seamen named as libelants being represented herein by proctor Allan Brotsky, Esq. and proctor Rubin Tepper, Esq. of Messrs. McMurray, Walker & Tepper, and respondents Matson Navigation Company, The Oceanic Steamship Company, and Oliver J. Olson & Co. being represented by proctors Alvin J. Rockwell, Esq. and John M. Naff, Jr., Esq. of Messrs. Brobeck, Phleger & Harrison and respondent Coastwise Line being represented by proctor Richard Ernst, Esq. and respondent American President Lines, Ltd. being represented by proctors Peter N. Teige, Esq. and George D. Wick, Jr., Esq. and respondent Grace Line, Inc. being represented by proctors William R. Ray, Esq. and Maynard Garrison, Esq. of Messrs. Wallace, Garrison, Norton & Ray and respondents American Mail Line, Pacific Far East Lines, Pacific Atlantic Steamship Co., Pacific [R. 226] Transport Lines, States Steamship Co., Pacific Argentine Brazil Lines and Pope & Talbot, Inc. being represented by proctors James L. Adams, Esq. and Gary J. Torre, Esq. of Messrs. Lillick, Geary, Wheat, Adams & Charles, and the matter having been argued and duly submitted for decision and the Court having considered the entire matter, including the previous orders of this Court dated November 16, 1956, February 12, 1957, February 5, 1959, May 6, 1959, July 17, 1959, and December 30, 1959, and the Court, after due deliberation, having determined:

> The Second Amended Libel filed on January 14, 1960 does not tender any claims by the original four libelants either in their own behalf or in a representa-

tive capacity in behalf of other seamen in the manner prescribed by previous orders of this Court. For the first time, four years after the commencement of this action, the amended libel names as libelants such seamen whom the four original libelants could readily locate to represent and name as respondents many shipowning companies not before the Court.

Thus the Second Amended Libel not only [illegible] the causes of action arising out of alleged contracts of employment, but necessitates the use of the information required to present the claims of the new seamen as they are now presented has been available in the records of the Court since the commencement of this action. Since the order of this Court entered on November 16, 1956, the presently named libelants have been apprised of the particulars inherent in the presentation of their claims in a representative suit. Yet, they have delayed more than three years to file the amended libel on their own behalf.

And the Court having entered its Order denying Motion to Dismiss,

This Court hereby expressly determines that there is no just reason for delay in the entry of a final [illegible] as to all seamen named as libelants in the Second Amended Libel in Personam or in the Second Amended Libel in Personam and as to all respondents named in the Second Amended Libel in Personam or in the Second Amended Libel in Personam, with the exception of the claims of John J. Rogers on his own behalf against the American President Lines, Ltd., which are the subject matter of the separate libel filed on March 19, 1959.

Now therefore it is ordered, adjudged and decreed that the claims of John J. Rogers on his own behalf against [R. 227] the American President Lines, Ltd., which are the subject matter of the separate libel filed on March 19, 1959, be, and they hereby are, severed from this action; and

It is further ordered, adjudged and decreed that this action be, and it is hereby, dismissed as to all seamen named as libelants in the Seamen's Libel in Personam or in the Second Amended Libel in Personam and all respondents named in the Seamen's Libel in Personam or in the Second Amended Libel in Personam, but this dismissal shall not affect the claims of John J. Rogers on his own behalf against the American President Lines, Ltd., that have been severed from this action and which are the subject matter of the separate libel filed on March 19, 1959; and

It is further ordered, adjudged and decreed that the Clerk of this Court is expressly directed to enter this final decree dismissing this action as to all said seamen and all said respondents but this entry shall in no way affect the claims of John J. Rogers on his own behalf against the American President Lines, Ltd. that have been severed from this action; and

It is further ordered, adjudged and decreed that all sureties for cost that might be assessed against respondents other than the American President Lines, Ltd. are hereby released, discharged and exonerated.

Dated: February 16, 1960.

s LOUIS GOODMAN
United States District Judge

[Endorsed]: Filed Feb. 16, 1960. C. W. Calbreath, Clerk.
(Entered 2-17-60.)
[R. 228]

In the United States District Court for the Northern District of California, Southern Division

In Admiralty No. 27278

JOHN J. ROGERS, et al., *Libelants*, vs. AMERICAN PRESIDENT LINES, LTD., et al., *Respondents*.	)

ORDER SUSTAINING EXCEPTIONS TO AMENDED LIBEL

Libelant, a seaman in the stewards department, has filed a libel in personam "for wages under general maritime law". The amended libel with which we are here concerned contains eighteen counts, all of which are framed as common counts, the odd numbered counts beginning with Count 1 being based on quantum meruit for the reasonable value of services rendered by libelant, each count on a specific voyage, and the even numbered counts beginning with Count 2 restating the claim for the difference between what libelant received for [R. III. 27] his services and the reasonable value of such services, these counts are based on unjust enrichment implied in law theory.

The parties, in oral argument and in numerous briefs filed herein during the progress of this litigation, admit that this seaman, on each voyage, signed articles which clearly constitute a written contract of employment, and at completion of the voyage written releases were executed. Both of these writings were executed in accordance with laws of the United States passed for the purpose of protecting the seaman. In addition, the court may take judicial notice of the fact that this seaman, serving in the stewards department, worked under a consent decree of the Court of

Appeals for the Ninth Circuit entered in the case of *National Labor Relations Board vs. Pacific American Shipowners Association, etc.*, Number 13,386 in the files of the Court of Appeals.

On their face, the common counts upon which libelant relies do not satisfy the requirements of Rule 22 of the Supreme Court Admiralty Rules. Common counts arising from the common law are allowed as statements of legal conclusions, they never constitute statements of fact. Admiralty does not have a common law background and under Rule 22 of the Supreme Court Rules a libel shall "propound and allege in distinct articles the various allegations of fact upon which the libelant relies in support of his suit." In the instant case libelant argues that his pleadings adequately state libelant's claim and apprise respondent sufficiently of the nature of his [R. III. 28] claim without setting forth facts beyond the mere conclusions therein stated.

This can not be, for in this case these common counts, when considered together with the admitted facts and those of which this court can take judicial notice, that a written contract and a written release exist, that these agreements are of a type required by and executed in accordance with the laws of the United States, do not properly state a cause of action. Both the contract of employment of libelant and his release upon completion of the voyage must be set aside herein under some theory before libelant can successfully recover. The very least required of libelant is that he set forth the facts he relies on to avoid the ordinary meaning of the employment contract and the release. If he relies upon fraud or perhaps upon duress he must allege what facts constitute such; if he has another theory to avoid these agreements he should state it. It is a clear rule at law that averments of this nature must be by explicit pleading (F.R.C.P. 9(b).)

Thus it will be seen that even at law libelant's pleading is defective; certainly then in admiralty this pleading can not meet the more stringent test of Rule 22.

Under these circumstances respondents' exceptions to the amended libel filed herein on March 19, 1959, are sustained. Libelant is hereby granted thirty days to file a [R. III. 29] second amended libel herein.

Dated: May 31, 1960.

ALBERT C. WOLLENBERG
United States District Judge.

[Endorsed]: Filed May 31, 1960. Clerk U. S. Dist. Court, San Francisco.

[R. III. 30]

[Title of Court and Cause.]

ORDER DENYING MOTION FOR RECONSIDERATION.

Libelant's motion for reconsideration of the order of this Court of May 31, 1960, Sustaining Exceptions to Amended Libel came on for hearing. The oral arguments and opposing memoranda of points and authorities failed to point out error in the previous order and failed to disclose any material matters not previously considered and ruled upon.

The motion for reconsideration is grounded in part upon the fact that the Court did not cite *Archawski v. Hanlon*, 350 US 532, in its order. This case was before the Court and was considered. It was cited and discussed in the [R. III. 42] memoranda of both parties. It held that the libelant in that case had alleged a cause of action upon maritime contract within the Admiralty jurisdiction of the District Court. The case does not support the position of the Libelant that the pleadings in this case contain sufficient allegations of fact to meet the requirements of Admiralty Rule 22.

The motion for reconsideration is hereby, DENIED.

Dated: July 15, 1960

ALBERT C. WOLLENBERG
United States District Judge

[Endorsed]: Filed Jul. 15, 1960. Clerk U. S. Dist. Court, San Francisco.

[R. III. 43]

[Title of Court and Cause]

FINAL DECREE OF DISMISSAL

Libelant John J. Rogers having elected to stand on the pleadings on file herein and the court having entered an order dismissing the libel of John J. Rogers against respondent American President Lines, Ltd. on August 5, 1960,

It is hereby ordered, adjudged and decreed that the action of said John J. Rogers against respondent American President Lines, Ltd. be, and the same is, hereby, dismissed.

ALBERT C. WOLLENBERG
United States District Judge

Dated: September 2, 1960

[Endorsed]: Filed Sept. 2, 1960, Clerk U. S. Dist. Court, San Francisco.

[R. III. 45]

The form of the attached decree is approved.

/s/ *Peter N. Teige*
/s/ *George D. Wick, Jr.*
/s/ *Richard Ernst*
Proctors for Respondent
American President Lines, Ltd.

The form of the attached decree is approved.

/s/ *Rubin Tepper*
Proctor for Libelant

[R. III. 46]